SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 80

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, AND ROYAL IDEMNITY COMPANY, PETITIONERS,

vs.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Southern	v	
New York	1	1
Docket entries	1	1
Libel and complaint of Louis H. May	3	2
Interrogatories to be addressed to the respondent, to be answered in writing and under oath	13	8
Answer of Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft to libel and complaint of Louis H. May	15	10
Answers to interrogatories annexed to the libel and addressed to the respondent	28	18
Libellant's Exhibit C—Stipulation as to facts	30	19
Stipulation consolidating actions	32	20
Exhibit 1—Bill of lading	34	21
Exhibit 2—Bill of lading	49	33
Order of reference	73	49
Order extending time for special commissioner to file report and consolidating actions	75	50
Deposition of Paul Krueger	77	51
Depositions taken at Hamburg	176	137

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1933

	Original	Print
Stipulation as to testimony	176	138
Objections to evidence	177	138
Testimony of Hugo Brandt	178	139
Oscar Dahlstrom	190	149
Otto Reichenbacher	200	157
Heinrich Klaassen	222	176
Adolf Julicher	230	183
Adolphe Menck	243	193
John Wuhrmann	247	197
Ernst Saxe	260	207
Christen Thiessen	275	219
Georges Sievers	288	230
Hermann Asmus	294	235
Emile Auguste Schubert	300	241
Wilhelm Jenfeldt	304	244
Hermann Asmus (recalled)	306	246
Auguste Warns	307	247
Otto Reichenbacher (recalled)	314	253
Statement of evidence before special commissioner	321	258
Appearances	321	258
Testimony of Fritz Schier	321	259
Offers in evidence	352	285
Testimony of William G. McLennan	356	288
Alfred E. Jordan	405	329
Robert McGregor	435	353
James French	464	376
Walter N. Davis	487	396
Anthony Huseby	516	419
Libellant's Exhibit A—Translation of the record and proceedings before board of marine inspectors at Bremerhaven	561	455
Libellant's Exhibit B—Translation of the findings of the court at Bremerhaven	581	468
Libellant's Exhibit 11—Excerpt from log (deck) of motorship "Isis"	596	480
Libellant's Exhibit 12—Excerpt from log (engine) of motorship "Isis"	603	484
Respondent's Exhibit 1—Translation of letter, dated February 9, 1928	610	490
Respondent's Exhibit 1-A—Translation of excerpt from the log of the German-owned motorship "Isis"	611	491
Respondent's Exhibit 3—Translation of letter, dated July 3, 1928	614	493
Respondent's Exhibit 4—Translation of letter, dated July 3, 1928	616	494
Respondent's Exhibit 5—Translation of letter, dated June 26, 1928	617	495
Respondent's Exhibit 6—Photoprint	619	496
Respondent's Exhibit 7—Photoprints	621	498

	Original	Print
Respondent's Exhibit 17—Stipulation as to testimony of engineers	622	497
Respondent's Exhibit 18—Diagram marked in evidence at folio 1055	623	498
Report of special commissioner	624	499
Libellant's exceptions to report of special commissioner	675	537
Respondent's exceptions to report of special commissioner	682	542
Memorandum of Coleman, D. J.	685	543
Final decree	689	546
Stipulation as to exhibits	692	548
Libellant's notice of appeal and allowance of appeal	693	548
Assignments of error	695	549
Stipulation as to record	704	555
Clerk's certificate (omitted in printing)	705	
Proceedings in United States circuit court of appeals, second circuit	706	555
Opinion, Manton, J.	706	555
Decree	711	564
Stipulation as to notice and order allowing appeal in behalf of Indemnity Insurance Co. and Royal Indemnity Co.	713	564
Notice and order allowing appeal	714	565
Clerk's certificate (omitted in printing)	717	
Order allowing certiorari	718	566

[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Consolidated Action 102-296

Lewis H. May, Libellant,

against

Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, Respondent

Docket Entries

Sept. 24, 1929.—Filed libel and stipulation for costs and interrogatories.

Dec. 27, 1929.—Filed notice of appearance and stipulation for cost.

Jan. 24, 1930.—Filed answer and answers to interrogatories.

Jan. 31, 1930.—Filed notice of trial and note of issue (March).

Dec. 2, 1930.—Filed order of reference to M. W. Maclay, Woolsey, J.

Jan. 14, 1931.—Filed order that time for Commissioner to file his report be extended to Feb. 2, 1931, and consolidating this cause with 102-128, 102-155, 103-353, 105-360, Woolsey, J.

Jan. 27, 1931.—Filed report of Commissioner, minutes of hearing and libellant's and respondent's exhibits.

Jan. 29, 1931.—Filed notice of filing Commissioner's report.

Jan. 30, 1931.—Filed stipulation extending time to file exceptions to the report to March 2, 1931.

[fol. 2] Mar. 2, 1931.—Filed respondent's exceptions.

Mar. 9, 1931.—Filed libellant's exceptions.

Oct. 27, 1931.—Filed opinion #6747.

Oct. 28, 1931.—Filed in 102-296 Supp. affidavit in support of motion, Coleman, J.

Oct. 28, 1931.—Filed in 102-296 affidavit in opposition to motion.

Jan. 16, 1932.—Filed bill of costs and taxation $1,150.77.

Feb. 18, 1932.—Filed order confirming report of Special Commissioner dismissing libels, Coleman, J.

Feb. 16, 1932.—Filed duplicate original bill of costs on stipulation. The amount of the costs was reduced to $1,050.32.

Apr. 8, 1932.—Filed notice and order allowing appeal, and assignments of error.

May 13, 1932.—Filed consent and order extending time to file record on appeal to July 16, 1932 (Clerk).

May 18, 1932.—Filed notice and order allowing appeal, Caffey, J.

May 16, 1932.—Filed consent and order extending term of Court to July 16, 1932 (Clerk).

Note

The Docket Entries in

Action No. 2, 102-128;
" " 3, 102-155;
" " 4, 103-353, and
" " 5, 105-360,

are omitted from the record, as all of above suits were consolidated with Action No. 1, Docket 102-296. The Docket Entries in the latter suit are printed herein in full. (See Stipulation Consolidating Actions, p. 32 hereof.)

[fol. 3] In United States District Court

Libel and Complaint of Louis H. May

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Action No. 1

The Libel and Complaint of Louis H. May against Hamburg Amerikanische Packetfahrt Aktien-Gesellschaft, in a cause of contract, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. At all the times hereinafter mentioned your libellant was, and he still is, a resident of the City of New York.

Second. Upon information and belief, at all the times hereinafter mentioned the respondent above named was, and it still is, a foreign corporation, duly organized, created and existing under and by virtue of the laws of Germany, owning and operating a number of steam and motor-

vessels engaged in the carriage of cargo as a common carrier on the high seas, having an office and principal place of business in the City of Hamburg, Germany, and the owner of the motorship "Isis", which at all the times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, among others, the ports of Tacoma, Vancouver, Portland, San Francisco, Puntarenas, Costa Rica, Bremen and Hamburg.

Third. During the month of December, 1927, certain consignments of merchandise, in good order and condition, [fol. 4] were delivered to the respondent and by it shipped and placed on board the motorship "Isis", to be carried by the said respondent on the said vessel to the ports of Hamburg, Antwerp and London, and there to be delivered in like good order and condition as when shipped, unto the order of the respective consignees, in consideration of a certain agreed freight and in accordance with the valid terms of certain bills of lading covering the said shipments, then and there signed and delivered to the respective shippers by the duly authorized agents of the said motorship "Isis" and of the respondent.

The ports of shipment, the consignors, a description of the merchandise shipped, and the consignees, are as follows:

Port	Consignor	Merchandise	Consignees	Item No.
Tacoma	Brandeis Goldschmidt & Co.	636 copper wire bars	Order Shipper	1
"	American Export Door Corp.	128 bundles plywood	"	2
"	American Export Door Corp.	204 bundles plywood	Order Shipper	3
Vancouver	DeKage Handels A/G	50 cs. Salmon tails	DeKage Trading Co., Ltd. Bey & Zimmer, succs., Warri	4
"	O'Loana Kiely & Co.	70 cs. Salmon halves	Order Shipper	5
Portland	Wolf Hop Co.	50 bales hops	Onof Delplace Fils	6
San Francisco ...	Griffith Durney Co.	100 cs. canned asparagus	Order Shipper	7
" ...	Guggenhime & Co.	250 boxes raisins	Order Shipper	8
" ...	"	150 boxes evaporated apples	Order Shipper	9

[fol. 5]

Port	Consignor	Merchandise	Consignees	Item No.
Puntarenas	Ida B. V. de Ontung	100 sacks coffee	Goschens & Cunliffe	10
"	Wilhelm Peters	742 sacks husk coffee	"	11
"	Piza & Keith	211 sacks husk coffee	"	12
"	Guido Von Schroter	340 sacks husk coffee	Rosing Bros. & Co.	13
"	Edgar Knohr & Co.	119 sacks husk coffee	"	14
"	Pedro Solorzano	219 sacks husk coffee	Arbuthnot Latham & Co., Ltd.	15

For convenience of future reference herein, an item number has been placed opposite the names of the respective consignees.

Fourth. Thereafter the said motorship "Isis", having on board the said merchandise hereinbefore described in Article "Third", sailed from her ports of loading bound for Hamburg, but the respondent thereafter and on or about February 10, 1928, transshipped said merchandise into a lighter or lighters for transportation to Hamburg, and after the arrival of said merchandise at Hamburg, respondent wrongfully and contrary to the valid provisions of the bills of lading covering said merchandise, refused to make [fol. 6] delivery to the respective consignees of any of said merchandise described in Article "Third" hereof, unless and until large deposits of money should be made by the respective consignees, as security for contributions alleged to be due under a general average in connection with the said voyage of the motorship "Isis", in relation to the said merchandise.

Fifth. Upon information and belief, subsequent to the arrival of the merchandise hereinbefore described in Article "Third", at the port of Hamburg, as aforesaid, the respondent on-carried the merchandise set out as Item 6 in Article "Third", to the port of Antwerp, but, upon the arrival of the said merchandise at the port of Antwerp, the respondent wrongfully and contrary to the valid provisions of the bill of lading covering said merchandise, refused to make delivery to the consignee of the said merchandise unless and until a large deposit of money should

be made by the consignee as security for contribution alleged to be due under a general average in connection with the said voyage of the motorship "Isis" in relation to the said merchandise.

Sixth. Upon information and belief, subsequent to the arrival of the merchandise hereinbefore described in Article "Third", at the port of Hamburg, as aforesaid, the respondent on-carried the merchandise set out as Items 10, 11, 12, 13, 14 and 15 in Article "Third", to the port of London, but, upon the arrival of the said merchandise at the port of London, the respondent wrongfully and contrary to the valid provisions of the bills of lading covering said merchandise, refused to make delivery to the consignee of any of the said merchandise unless and until a large [fol. 7] deposit of money should be made by the consignee as security for contributions alleged to be due under a general average in connection with the said voyage of the motorship "Isis" in relation to the said merchandise.

Seventh. In order to secure said merchandise hereinbefore described in Article "Third" hereof, the owners thereof, or the agents of said owners on their behalf, were obliged to deposit, and under duress did deposit, certain sums of money as security for the general average contributions alleged to be due. The names of the parties making said deposits, the date of making said deposits, the amount of said deposits, and the merchandise in relation to which said deposits were made, are as follows:

Name	Date, 1928	Amount	Mdse.	Item No. in article third
Brandeis, Goldschmidt & Co.	Mar. 5th	$3,250.20	636 copper wire bars.	1
Traun & Co.	Feb. 17th	1,085.00	128 bundles plywood.	2
			204 bundles plywood.	3
Dekage Handels-Aktien-Gesellschaft.	Mar. 19th	57.75	50 cs. salmon talls.	4
Paul Alfons Rehbein	Feb. 18th	108.30	70 cs. salmon halves.	5
R. H. A. Catteuw, on behalf of Onof Delplace Fils.	May 14th	560.00	50 bales hops.	6
S. Becker G. M. B. H.	Feb. 21st	120.00	100 cs. asparagus	7
[fol. 8] Emmanuel Lebenheim	Feb. 28th	113.00	250 boxes raisins.	8
Landsberger & Sachs	Feb. 22nd	268.00	150 cs. evap. apples.	9

Name	Date, 1928	Amount	Mdse	Item No. in article third
Goschens & Cunliffe	Feb. 20th	£1514 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $7,376.20)	100 sacks clean coffee.	10
			742 sacks husk coffee.	11
			211 sacks husk coffee.	12
Rosing Bros & Co.	Feb. 29th	£720 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $3,400)	340 sacks husk coffee	13
			110 sacks husk coffee	14
Arbuthnot Latham & Co., Ltd.	Feb. 23rd	£300 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $1,462.50)	210 sacks husk coffee	15

Eighth. Prior to the making of said deposits referred to in the preceding article hereof, and prior to the commencement of this action, the following parties became for value the owners and holders of the bills of lading covering the merchandise described in Article "Third" hereof. The shipments owned by the respective parties, are referred to [fol. 9] below by the item numbers set out in the schedule included in Article "Third" hereof:

Name	Item Nos.
Brandeis, Goldschmidt & Co.	1
Traun & Co.	2 and 3
Dekage Handels-Aktien-Gesellschaft	4
Paul Alfons Rehbein	5
Onof Delplace Fils	6
S. Becker G. M. B. H.	7
Emmanuel Lebenheim	8
Landsberger & Sachs	9
Goschens & Cunliffe	10, 11 & 12
Rosing Bros. & Co.	13 & 14
Arbuthnot Latham & Co., Ltd.	15

Ninth. By reason of the premises the parties referred to in the preceding article sustained damage in the respective sums indicated below, with interest thereon from the dates designated.

Name	Amount	Interest from 1928
Brandeis, Goldschmidt & Co.	$3,250.20	March 5th
Traun & Co.	1,085.00	Feb. 17th
Dekage Handels-Aktien-Gesellschaft	57.75	March 19th
Paul Alfons Rehbein	108.30	Feb. 18th
Onof Delplace Fils	560.00	May 14th
S. Becker G. M. B. H.	120.00	Feb. 21st
Emmanuel Lebenheim	113.00	Feb. 28th
Landsberger & Sachs	268.00	Feb. 22nd
Goschens & Cunliffe	7,376.20	Feb. 20th
Rosing Bros. & Co.	3,400.00	Feb. 29th
Arbuthnot Latham & Co., Ltd.	1,462.50	Feb. 23rd

[fol. 10] Tenth. Subsequently, the owners of the said merchandise sold, assigned, transferred and set over to your libellant, his heirs, executors, administrators and assigns, all their right, title and interest in and to any and all claim or claims, cause or causes of action which they had against the respondent by reason of the demand and collection by the said respondent of the various sums set out in Article "Seventh" herein as alleged security for contribution in general average alleged to be due in respect to the merchandise set out in Article "Third" hereof.

The names of the assignors, the dates of the assignments and the amount of the deposits covered by the said assignments, are as follows:

Name	Date 1929	Amount
Brandeis, Goldschmidt & Co.	May 16th	$3,250.20
Traun & Co.	Jan. 12th	1,085.00
Dekage Handels-Aktien-Gesellschaft	March 5th	57.75
Paul Alfons Rehbein	Jan. 2nd	108.30
Onof Delplace Fils	June 17th	560.00
S. Becker G. M. B. H.	March 18th	120.00
Emmanuel Lebenheim	Jan. 7th	113.00
Landsberger & Sachs	Feb. 14th	268.00
Goschens & Cunliffe	May 19th (£1514)	7,376.20
Rosing Bros. & Co.	June 11th (£720)	3,400.00
Arbuthnot Latham & Co., Ltd.	May 9th (£300)	1,462.50

Eleventh. By reason of the premises, libellant has sus-
[fol. 11] tained damage in the sum of Seventeen thousand eight hundred and 95/100 ($17,800.95) Dollars, (this sum representing the total of the deposits referred to in the schedule contained in Article "Seventh" hereof), together with interest thereon from the respective dates shown in Article "Ninth" hereof.

Twelfth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, issue against Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, the respondent herein, and that the said respondent be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Office & P. O. address: No. 64 Wall Street, Borough of Manhattan, New York City.

[fol. 12] *Duly sworn to by Louis H. May. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

INTERROGATORIES TO BE ADDRESSED TO THE RESPONDENT, TO BE ANSWERED IN WRITING AND UNDER OATH

First Interrogatory. State whether or not the bills of lading, photostat copies of which are hereto annexed, marked Exhibits 1 to 15, inclusive, were issued by the duly authorized agent or representative of the respondent.

Second Interrogatory. Is it not a fact that the respondent required deposits of money as security for contributions alleged to be due under a general average in connection with the said voyage of the motorship "Isis", before it would make delivery of the merchandise described in Article "Third" of this libel, and were not the amounts set out in the schedule below, deposited in connection with the respective shipments listed:

Name	Date 1928	Amount	Merchandise
Brandeis, Goldschmidt & Co.	Mar. 5th	$3,250.20	636 copper wire bars (as described in the Third Article of libel)
Traun & Co.	Feb. 17th	1,085.00	128 bundles plywood, 201 bundles plywood (as described in the Third Article of libel)
Dekage Handels-Aktien-Gesellschaft	Mar. 19th	57.75	50 cs. salmon talls (as described in Article Third of the libel)
Paul Alfons Rehbein.	Feb. 18th	108.30	70 cs. salmon halves (as described in Article Third of libel)
R. H. A. Catteuw, on behalf of Onof Delplace Fils.	May 14th	560.00	50 bales hops (as described in Article Third of the libel)
S. Becker G. M. B. H.	Feb. 21st	120.00	100 cs. asparagus (as described in Article Third of libel)
[fol. 14] Emmanuel Lebenheim	Feb. 28th	113.00	250 boxes raisins (as described in Article Third of libel)
Landsberger & Sachs	Feb. 22nd	268.00	150 cs. evap. apples (as described in Article Third of libel)
Goschens & Cunliffe	Feb. 20th	£1514 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $7,376.20)	211 sacks husk coffee, 100 sacks clean coffee, 742 sacks husk coffee (as described in Article Third of the libel)
Rosing Bros. & Co.	Feb. 20th	£720 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $3,400.)	340 sacks husk coffee, 119 sacks husk coffee (as described in Article Third of the libel)
Arbuthnot Latham & Co., Ltd.	Feb. 23rd	£300 (Equivalent in American money at the rate of exchange prevailing at the time of the making of the deposit to $1,462.50)	219 sacks husk coffee (as described in Article Third of the libel)

Bigham, Englar, Jones & Houston, Proctors for Libellant.

Bills of Lading, Exhibits 1 to 15, annexed to interrogatories.

(Omitted pursuant to stipulation.)

[fol. 15] IN UNITED STATES DISTRICT COURT

ANSWER OF HAMBURG AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT TO LIBEL AND COMPLAINT OF LOUIS H. MAY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Action No. 1

The answer of Hamburg Amerikanische Packetfahrt Aktien Gesellschaft, to the Libel and Complaint of Louis H. May, in an alleged cause of contract, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. Respondent denies that it has knowledge or information sufficient to form a belief as to the allegations contained in the First article of the libel.

Second. Respondent admits the allegations contained in the Second article of the libel.

Third. Respondent admits the allegations contained in the Third article of the libel, except that it denies that it has knowledge or information sufficient to form a belief as to the allegations contained in the said article regarding the description or the order or condition of the merchandise referred to and specified in said article, and except that respondent denies that bills of lading for the several lots of merchandise referred to in said article as item numbers 10 to 15 inclusive were signed and delivered by agents of this respondent.

Fourth. The respondent admits that the "Isis" sailed from her ports of loading bound for various ports, including Hamburg, and that upon sailing as aforesaid she had on board merchandise as admitted in article Third of this [fol. 16] answer, and that on or about February 10th, at the port of Bremen, in accordance with the provisions of the said bills of lading covering the said merchandise, she duly transshipped certain merchandise into a lighter or lighters for transportation to Hamburg, and upon the arrival of said cargo at Hamburg duly required before making delivery, general average deposits from the consignees thereof, on behalf of duly appointed average adjusters and

of the cargo, hull and freight interests involved in said voyage, and according to the established law and practice with regard to such matters, as hereinafter shown and alleged. Except as herein admitted, the respondent denies each and every allegation contained in the Fourth article of the libel.

Fifth. The respondent admits that subsequent to the arrival of the merchandise mentioned in article Third of this answer at the port of Hamburg, as aforesaid, respondent, in accordance with the provisions of the said bills of lading covering the said merchandise, duly on-carried the merchandise referred to as item number 6 in Article Third of the libel, to the port of Antwerp, and upon arrival there duly required, before taking delivery, general average deposits from the consignees thereof, on behalf of duly appointed average adjusters and of the cargo, hull and freight interests involved in said voyage, and according to the established law and practice with regard to such matters, as hereinafter shown and alleged. Except as herein admitted, the respondent denies each and every allegation contained in the Fifth article of the libel.

Sixth. The respondent admits that subsequent to the arrival of the merchandise mentioned in article Third of this [fol. 17] answer at the port of Hamburg as aforesaid, respondent, in accordance with the provisions of the said bills of lading covering the said merchandise, duly on-carried the merchandise described as item numbers 10, 11, 12, 13, 14 and 16 in article Third of the libel, to the port of London, and upon arrival there duly required, before taking delivery, general average deposits from the consignees thereof, on behalf of duly appointed average adjusters and of the cargo, hull and freight interests involved in said voyage, and according to the established law and practice with regard to such matters, as hereinafter shown and alleged. Except as herein admitted, the respondent denies each and every allegation contained in the Sixth article of the libel.

Seventh. The respondent admits that, in accordance with the provisions of the bills of lading covering the merchandise mentioned in article Third of this answer, before receiving delivery of the said merchandise, the owners thereof

or their agents were, on behalf of duly appointed average adjusters and of the cargo, hull and freight interests involved in said voyage, and according to the established law and practice with regard to such matters, duly required to deposit and did deposit certain sums of money as security for general average contributions due or to become due, the names of the parties making said deposits; the date of making the same, the amount thereof and the merchandise in relation to which said deposits were made being approximately as set forth in said article Seventh of the libel, subject to correction in accordance with the proof thereof produced upon the trial of this suit. Except as herein expressly admitted, respondent denies each and every allega-
[fol. 18] tion contained in the said Seventh article of the libel.

Eighth. Respondent denies that it has knowledge or information sufficient to form a belief as to any of the allegations contained in the Eighth article of the libel.

Ninth. Respondent denies each and every allegation contained in the Ninth article of the libel.

Tenth. Respondent denies that it has knowledge or information sufficient to form a belief as to any of the allegations contained in the Tenth article of the libel.

Eleventh. Respondent denies each and every allegation contained in the Eleventh article of the libel.

Twelfth. Answering the Twelfth article of the libel, respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but denies that all and singular the premises are true.

For a first, separate and complete defense to the libel, respondent alleges upon information and belief as follows:

Thirteenth. The respondent hereby repeats and realleges each and every of the denials, admissions, qualifications and allegations contained in articles numbered First to Twelfth inclusive of this answer, with the same force and effect as if the same were herein set forth at length.

Fourteenth. That certain shipments of cargo referred to in the Third article of the libel as item numbers 1 to 9 in-
[fol. 19] clusive, consisting of merchandise as admitted in

article Third of this answer, which were delivered to the motorship "Isis" at the ports of Tacoma, Vancouver, Portland and San Francisco, were received by the said steamer to be carried under and pursuant to certain bills of lading, photostatic copies of which are annexed to the said libel marked Exhibits 1 to 9 inclusive, the terms and provisions of which contain, with regard to each item of cargo mentioned therein, the contract of carriage therefor; and reference is hereby made to the originals of the said bills of lading to be produced on the trial of this action for greater certainty as to the terms and provisions thereof.

Fourteenth. Each of the said bills of lading contains, among others, the following provisions.

"4. The carrier may substitute another vessel or vessels or transship the whole or any part of the goods by any other vessel, whether operated by the carrier, or by others at the original port of shipment, or at any other place or places, and may forward the goods by other means when necessary but shall be under no obligation to do so. The vessel with the goods on board, either before or after proceeding toward the port of discharge may remain in port, proceed by any route and deviate from or change the advertised and intended route at any stage of the voyage and may proceed to and stay at any place whatsoever, although in a contrary direction to, or outside of or beyond the usual route to the said port of discharge, once or oftener, in any order, back- [fol. 20] wards or forwards, for loading and/or discharging cargo, fuel, stores or passengers, and/or for any purpose whatsoever that in the opinion of the carrier or master may seem advisable, and although pertaining to another voyage. This liberty is not to be considered as restricted by any words of this contract whether written, stamped or printed. The vessel may adjust compasses, dock and go on ways with or without cargo on board, before or after commencing the voyage and may sail without pilots, tow and assist vessels in all situations and deviate for the purpose of saving life or property.

5. In case the voyage is broken up or so far delayed or interrupted as to make it reasonable so to do, the Carrier may forward the goods to or toward the port of destination above named by another vessel or conveyance (either of

the Carrier or of another), for which an additional freight shall be paid, or may store the same at the nearest practicable place; all at the risk and expense of the goods, their shipper, owner, and/or consignee. Such forwarding or storage shall constitute a valid delivery under this contract, terminating all responsibility of the Carrier, provided that reasonable notice be dispatched to shipper or consignee; but the Carrier shall retain a lien on the goods for all proper charges and expenses. If salvage services be rendered to the Goods by the Carrier they shall be paid as [fol. 21] fully as if rendered by strangers.

* * * * * * *

7. General Average shall be payable in accordance with the York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the port of New York. All General Average statements shall be prepared at the vessel's final port of discharge or elsewhere at the carrier's option. If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the vessel, or from any latent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril. The general average state-[fol. 22] ment is to be made up in American Gold Dollars or in British Pounds Sterling or in Reichsmark at shipowner's option. The shipowner is entitled to require a deposit in any of these three currencies.

8. This shipment is subject to all the exemptions and limitations from liability contained in the act of Congress of the United States approved on the 13th day of February,

1893, and entitled 'An Act relating to the Navigation of Vessels, etc.', even though the vessel be not transporting property to or from any port in the United States. In the event of shipment being made from a Canadian port the shipment is subject to all the terms and provisions of and all exemptions from liability contained in the Water Carriage Goods Act, 1910."

Sixteenth. That certain shipments of cargo referred to in the Third article of the libel as item numbers 10 to 15 inclusive, consisting of merchandise as admitted in article Third of this answer, which were delivered to the motorship "Isis" at the port of Puntarenas, were received by the said steamer to be carried under and pursuant to certain bills of lading, photostatic copies of which are annexed to the said libel marked Exhibits 10 to 15 inclusive, the terms and provisions of which contain, with regard to each item of cargo mentioned therein, the contract of carriage therefor, and reference is hereby made to the originals of the said bills of lading to be produced at the trial of this action for greater certainty as to the terms and provisions thereof.

[fol. 23] Seventeenth. Each of the said bills of lading contains, among others, the following provisions:

"General Average, if any, to be adjusted at the Company's option either at Bremen or at final Port of Destination; always according to York-Antwerp-Rules and as to matters not therein provided for, according to the usages of the place where the adjustment is made up."

* * * * * * *

"4. The Company to be at liberty to transship the within named goods, and to forward same by steamer or steamers at the risk of the Owners, it being agreed that the Captain, Officers and Crew of the Vessel in transmission of the goods as between the Owners thereof and the Company are to be considered the servants of such Owner. Surtaxe d'Entrepot at Continental Ports, if any, to be payable by and for account of the Owners.

* * * * * * *

"20. General Average, if any, to be adjusted at the Company's option either at Bremen/Hamburg or at final Port

of Destination; always according to York-Antwerp-Rules, and as to matters not therein provided for, according to the usages of the place where the adjustment is made up. In case of General average the contributing value of the ship shall be taxed obligatory in a German port. For this purpose the Owners are bound to declare, if required, the value of the goods and no goods will be delivered without [fol. 24] security having been given by the Owners for the due payment of such General Average. Default, Error, Neglect in judgment or mistake of the Pilot, Master or the Crew in the Navigation of the Ship, Defects of the Vessels or her Engines not noticed before and occasioned during the voyage shall not release the Owners from such contribution.

* * * * * * *

"28. The Company shall have a lien on all goods for unpaid freight and charges, whether payable in advance at Port of Shipment or not, and for payments made, or liabilities incurred in respect of any fines, expenses, or losses stipulated herein to be borne by the Owners, or previously unsatisfied freights or charges, payments or liabilities in respect of any other goods for which the Company has a claim on such Owners, and for inland and forwarding Charges, and the Company shall have the right to sell the goods by public auction, without notice, 14 days after exercise of lien, all expenses of exercise of lien and sale to be paid by the proceeds."

Eighteenth. That on or about the 6th day of February, 1928, the said motorship "Isis" was on her voyage from the ports of Tacoma, Vancouver, Portland, San Francisco and Puntarenas, to the ports of Bremen and Hamburg, as aforesaid, with cargo on board shipped at said loading ports as hereinbefore admitted or alleged, destined for the ports of Bremen, Hamburg, Antwerp and London. The "Isis" was in all respects seaworthy and properly manned, equipped and supplied, and was capable of completing her [fol. 25] intended voyage, the respondent having exercised due diligence to make her seaworthy and to have her properly manned, equipped and supplied, and capable of performing her intended voyage. Early on the said morning, while the ship was proceeding up the River Weser, be-

tween Elslether Sand and Blumenthal, it was determined by the pilot and master of the "Isis" that it was necessary to anchor on account of the density of the fog and the ship was accordingly anchored. At 7 A. M. on the same morning, when the fog lifted, it was discovered that the tide had swung the ship, causing her to ground. After proper steps had been taken to free the "Isis" by the assistance of tug boats to relieve her from her position of peril and to save ship and cargo, she was floated and proceeded to Bremen as a port of refuge, where inspections and repairs were duly made. On or about the 10th day of February, 1928, the m/s "Isis", having been duly inspected and repaired, and having been found seaworthy by Lloyd's surveyors, left the port of Bremen to call at the port of Hamburg and thus to complete her said voyage. At about 3:52 A. M. on February 10th, 1928, the "Isis", while being navigated by the river pilot and by her master and other ship's officers, ran aground at Vegesack off the mouth of the River Lesum. In lightening the ship and pulling her off the strand to relieve her from her position of peril and to save ship and cargo, and in taking her back to Bremen and there transshipping and forwarding the cargo in accordance with the provisions of the bills of lading covering the same, certain sacrifices, losses and expenses of a general average nature [fol. 26] were incurred, to relieve the adventure from the common peril and for the common benefit. In order to secure, as provided by said bills of lading, the payment by the owners or consignees of the various items of cargo mentioned in the libel herein and in this answer previously mentioned, average adjusters, duly appointed by the respondent, required, for the benefit of the cargo, hull and freight interests involved in the said voyage and in accordance with the law and practice applicable to such matters, general average deposits of cash to be made by the said consignees or owners of the said cargo, or their agents, and such deposits were accordingly made in approximately the respective amounts set forth in the libel. The said general average adjusters thereupon proceeded to state the said general average and are still engaged in so doing, and upon their completing the statement it will be determined how much contribution is due from each of the consignees or owners of each of the items of cargo mentioned in the

libel. Until the said average contributions are so determined, the general average adjusters are rightfully entitled to retain in their hands the amounts mentioned in the libel, the return of which the consignees or owners of the cargo are seeking to effect, and upon the stating of the general average the various interests will be entitled to payment out of such deposits of the amounts thus found due from each depositor.

Wherefore respondent prays that the libel herein be dismissed with costs.

Haight, Smith, Griffin & Deming, Proctors for Respondent, 27 William Street, New York City.

[fol. 27] *Duly sworn to by C. J. Beck and Emil Lederer. Jurat omitted in printing.*

[fol. 28] IN UNITED STATES DISTRICT COURT

ANSWERS TO INTERROGATORIES ANNEXED TO THE LIBEL AND ADDRESSED TO THE RESPONDENT

Answer to the First Interrogatory. Yes, as to Exhibits 1 to 9 inclusive. No, as to Exhibits 10 to 15 inclusive.

Answer to the Second Interrogatory. The duly appointed general average adjusters, through respondent, and on behalf of cargo, hull and freight interests involved, required, in accordance with provisions of the bills of lading covering the shipments and according to established law and practice with regard to such matters, general average deposits to be made. To the best of respondent's knowledge and information, the amounts of such deposits, together with the names of the deposit-s, the date of deposit and description of the merchandise concerned are correctly set forth in libellant's second Interrogatory (except as hereinafter stated), but the respondent refers to the proof of such deposits which will be made on the trial of this action, for further certainty as to the particulars thereof. According to present information, however, the amount of deposit by Emmanuel Lebenheim is incorrectly stated.

Haight, Smith, Griffin & Deming, Proctors for Respondent.

[fol. 29] *Duly sworn to by C. J. Beck and Emil Lederer. Jurat omitted in printing.*

[fol. 30] LIBELLANT'S EXHIBIT C

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Action #1

[Title omitted]

STIPULATION AS TO CERTAIN FACTS

It is hereby stipulated and agreed by and between the respective parties hereto, as follows:

1. The allegations in Article "First" of the libel are admitted.

2. That, for the purposes of this suit only, the merchandise referred to in Article "Third" of the libel was received on board the M/S "Isis" in good order and condition.

3. That the names of the parties making the general average deposits, the date of making said deposits, the amount of said deposits and the merchandise in relation to which said deposits were made are as set forth in Article "Seventh" of the libel, subject to correction if error be discovered before final termination of this suit.

[fol. 31] 4. That, subject to correction as provided above, the parties designated in Article "Eighth" of the libel were the owners of the merchandise referred to in said article, and that they subsequently sold, assigned, transferred, and set over to the libellant, his heirs, executors, administrators and assigns all their right, title and interest in and to the said deposits and any cause or causes of action against the respondent by reason of the demand and collection of the said deposits.

Dated New York, May 6, 1930.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Haight, Smith, Griffin & Deming, Proctors for Respondent.

[fol. 32] IN UNITED STATES DISTRICT COURT

Consolidated Nos. 102-296, 102-128, 102-155, 103-353, 105-360

[Title omitted]

STIPULATION CONSOLIDATING ACTIONS

It is stipulated and agreed that the libels, answers and stipulations of facts in the suits numbered: Action No. 2, Consolidated No. 102-128; Action No. 3, Consolidated No. 102-155; Action No. 4, Consolidated No. 103-353, and Action No. 5, Consolidated No. 105-360, being similar in form to the libel, answer and stipulation of facts in Action No. 1, being Consolidated No. 102-296, may be omitted from the record. The libels in Actions Nos. 2, 3, 4 and 5 refer to additional shipments of merchandise laden on the M/S "Isis" and allege the demand and collection from various consignees of various sums as security for contributions in general average. They also allege the assignments of all causes of action to the libellant, and the respective stipulations of fact concede this as well as the collection of the [fol. 33] deposits set out in the respective libels. The sums demanded in the five actions are as follows:

Action No. 1	$17,800.95
" No. 2	1,540.60
" No. 3	65,773.28
" No. 4	23,852.17
" No. 5	13,317.03

It is further stipulated and agreed that since the filing of the libels, the respondent has refunded that part of each and every deposit described in the five actions, which exceeded the sum set out as due in general average from each said item of cargo, in the general average statement prepared by Alfred Schmidt and Dr. jur. E. Prosch, sworn average adjusters and members of the Association of German Average Adjusters, dated at Hamburg, February 15, 1930. The libellant concedes that there has been a fair and proper adjustment of interest in connection with the said deposits if it is finally determined that the cargo involved in the five suits is liable to contribute in general average in relation to the second stranding, and if it is finally determined that the

cargo laden at Punta Arenas is liable to contribute in general average in connection with both strandings.

It is further stipulated and agreed that Action No. 5 covers, among others, a deposit of $703.26 taken on cargo carried on the M/S "Isis" from the port of Punta Arenas, Costa Rica, consigned to Swann & Co. under bill of lading 418, being Lfd. No. 467 in the general average statement heretofore referred to and being also item No. 41 in said Action No. 5; that $459.97 of this deposit has been returned. [fol. 34] It is further stipulated and agreed that all of the Punta Arenas cargo was shipped under bills of lading similar in form to the blank bill of lading annexed hereto and marked Exhibit 1; that the remainder of the cargo was shipped under bills of lading similar in form to the blank bill of lading annexed hereto and marked Exhibit 2.

Dated New York, April 12, 1932.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Haight, Smith, Griffin & Deming, Proctors for Respondent.

EXHIBIT 1 ANNEXED TO STIPUATION

Edition 1926. Homeward.

Roland-Linie

Aktien-Gesellschaft

Bremen

(Flag)

From West Coast of Central America via Panama Canal for Europe and Intermediate Ports

Agents

Mazatlan: Wöhler, Bartning Sucs.
Manzanillo: Adolfo Stoll & Co.
Acapulco: B. Fernández & Co., Sucs., S. en C.
Salina Cruz: B. Jiménez y Cia.
Champerico: Cia. de Agencias de Champerico, Ltda.

Guatemala-City: G. C. Boef, general agent for Central America.
Acajutla: Agencia Nacional, Ltda.
San Salvador-City: Rafael Ulloa.
[fol. 35] La Libertad: Agencia Salvadoreña.
La Union: International Railways of C. A.
Amapala: J. Roessner & Co.
Corinto: E. Palazio & Cia.
San Juan del Sur: C. Holman Hijo.
Puntarenas C. R.: Felipe J. Alvarado & Co.
Panama Canal: Panama Railroad Steamship Line, Balboa-Heights.
Buenaventura: Cia. de Comisiones y Transportes.
Guayaquil: Compañia Alemana de Agencias, general agents for Ecuador.
Lima: E. & W. Hardt, general agents for Peru.
Varparaiso: Compañia Trasportes Maritimos, general agents; Weber & Co., general representatives.
London: Moxon, Salt & Co., Ltd.
Antwerpen: A. Manceau.
Rotterdam: N. V. Wm. H. Müller & Co.
Amsterdam: N. V. Wm. H. Müller & Co.
Bremen: Herm. Dauelsberg.
Hamburg: Aug. Bolten, Wm. Millers Nachf.

Ship not accountable for countermarks.
Hamburg Quaydues on cargo to be paid entirely by the Receivers.
Should the Steamer be fumigated by the Clayton Apparatus or otherwise, any damage resulting by such fumigation to goods shipped, will not be accounted for by the owners or Agents of the steamers of this line.
Freight payable on weight delivered, or measurement or value respectively at Steamers option and charges for weighing or measuring to be paid by the consignees of the goods.
No Bills of Lading will be signed for less than £ 2.10.— sterling freight.
Shipped in apparent good order and condition by Guido [fol. 36] Von Schroter on board the Roland-Linie Aktien-Gesellschaft steamship, called the "Isis" whereof is Master for the present Voyage Krueger, or whoever else may go as Master in the said Ship, now lying in or off the Port of

Puntarenas, C. R. and bound for the Port of Bremen and intermediate Ports (via Panama Canal) with liberty to call at any Port or Ports in or out of the customary route and in any order and for any purpose, to carry goods of all kinds, whether on deck or under deck, and whether dangerous or otherwise; to substitute or tranship the goods by any other Steamer before the commencement of, or at any period of the voyage, to deviate for the purpose of saving life or property, to sail with or without pilots and to tow and assist vessels in all situations; to drydock, to repair, or to coal with or without the goods on board at the Port of Loading or Discharge or elsewhere.

Marks: La Raya London.
Packages: 340 Sacks.
Contents: Husk Coffee.
Grossweight Kilos: 23800.
Costa Rica Charges to Collect £ 41.7.0.

"Freight and Costa Rica Charges Payable Ship or Goods Lost or Not Lost."

Shipper declare insured under open policy of the consignees.

Freight Collect.

For any option granted, goods to pay — per ton in addition to the regular freight as expressed in the Bill of Lading, whether such option be availed of or not. If delivery under an optional Bill of Lading is taken at more than one port, any cargo forwarded from the port of discharge to such other port or ports is to pay a further charge of — per ton. If option is declared to a post terminal port additional rate to such port will be applied.

[fol. 37] being marked and numbered as per margin, but not hereby agreed, and to be carried to the Port of London or as near thereto as they can safely get without detention or delay of the ship and to be delivered, subject to the exceptions and conditions mentioned in this Bill of Lading, which constitutes the Contract between the Steamers Company and the Owners, from the Ship's tackle, where the Ship's responsibility shall cease, unto Rosing Brothers & Co. or to his or their Assigns, he or they paying freight without deduction at the rate of £ 7.0.0 per ton of 1000 Kilos Grossweight delivered or Measurement or Value respectively at Steamers option. Average as accustomed. General Aver-

age, if any, to be adjusted at the Company's option either at Bremen or at Final Port of Destination; always according to York-Antwerp-Rules and as to matters not therein provided for, according to the usages of the place where the adjustment is made up. Freight to be paid immediately on arrival of Steamer at the Port of Discharge without any allowance of credit or discount, in first class bankers sight drafts.

Notice.—In accepting this Bill of Lading, the Shipper for himself and on behalf of the Consignee or Owner of the goods or holder of the Bill of Lading, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed, or whether in accordance or not with the custom of the Port of Discharge; and the fact of its not being signed by the Shipper shall not prejudice the Clauses of this Bill of Lading, all of which are and shall be binding upon all the parties interested in the same manner and to the same extent, as if each or all of them had signed the Bill of Lading.

[fol. 38] In witness whereof the Master, Purser, or Agent of the said Ship has affirmed to three bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. If required by the company one of the Bills of Lading must be given up duly endorsed, in exchange for the goods or for delivery Order—Weights, Numbers Contents, and Value unknown.

Dated in Puntarenas, C. R. this 11th day of January, 1928.

We accept the conditions of this Bill of Lading, including those on back hereof.

For the Captain:

P. Krueger.

The Agents:

——— ———.

For the Shippers:

Felipe J. Alvarado & Co. (Signature illegible).

Conditions of Shipment, mutually agreed. The Shippers, Consignees, and Owners of the Goods, or their Agents are described herein as the Owners. The Owners or Charterers of the Ship, or their Agents are described herein as the Company.

1. The Company shall not be responsible for loss, non-delivery, delay, detention, damage or injury occasioned by

or arising, directly or indirectly, from any of the following perils, causes, or things, namely: Collisions with any vessels or substance, Interruption to Navigation by Ice, Stranding or other Risks and Perils of the Seas, Rivers, Canals, Docks, Navigation or Management of the Ship or of Land Transit of whatever nature or kind, or howsoever [fol. 39] caused; the Act of God, Enemies, Pilferage, Pirates, Robbers, Thieves, whether by land or sea, of whatever kind, in the Service of the Company or not, Capture, Seizure, Embargo, Adverse Claims, Legal or Civil Process, Arrests or Restraints of Princes, Rulers or People, Custom Laws of Foreign Countries, Claims of Ownership by third Parties, Revolutions, Emeutes, Mutiny, Sabotage, the Action of Mobs, Labour-Disturbances, Lock-outs, Strikes, Stoppage, or Shortage of Labour, Combination among Employers, or Workmen, or Others, Trade Disputes, from whatever cause, Explosion, Heat or Fire on Board, in Hulk or Craft, or on shore, or in Warehouse, before shipment or after landing of the Goods, jettison, Rain or Spray and other Accidents, Accidents of, Damage to, Defect in, or Failure of Engines, Boilers, Winches, Hull, Tackle, Shafts, Valves, Machinery, or their Appurtenances, Detention at any port of Transshipment, Lighterage, or Risk of Craft to or from the Vessel, Shipment or Transshipment, and of storage afloat or on shore, Congestion at port of Discharge or Transshipment, Evaporation, Smell, Leakage or other Goods Insufficiency of Packing in size, strength, or otherwise, Bursting of Packages or Consequences arising therefrom, Loss of Weight, Unprotected Goods, Injury to or soiling of Wrappers or Packages, Torn Packages, or Wrappers, Hook Marks, or Injury from Hooks, Drainage of any Animals carried in the said Ship or from their stalls, Breakage, Leakage, Sweating, Drainage from any other Goods, Effects of Climate, Steam, Smoke, Inherent Nature of Goods or Natural Decay, Heat of Holds, Damage from coal or coal-dust, Improper or defective Stowage, Unfitness or Insecurity of any Bullion-Room, Hold-Safe, Warehouse, or [fol. 40] other Place of Storage, Insufficiency or Absence of Marks, Numbers, or Addresses, or Description of Goods shipped, Difference between the Marks, Weights, Value, or the Contents of the Packages and the Description thereof in this Bill of Lading (the alleged marks, numbers or description in margin notwithstanding), Incorrect Delivery, Dam-

ages caused by Rats, Vermin, Rust, Oil or Contact with other Goods, Weight, Contents, Quality, Quantity, Condition, Measurement, Gauge, nor for the Value of Packages, Wireless Telegraphy Installation, Submerging or Sinking of Ship, Admission of Water into the Vessel by any cause, and whether for the purpose of extinguishing Fire or for any other purpose, Disinfection, or any other Measures of the Sanitary Authorities, Barratry, Neglects, Default, Omission, or Error in judgment or Mistake whatsoever of the Company, Pilot, Master, Mariners, Engineers, Stevedores, Workmen, or Others in the Service of the Company, Loss or Damage of Goods shipped on Deck with Owners approval.

2. All dangerous matters, corrosive, explosive or inflammable, will require to be shipped by special agreement, the Company having the option of accepting or refusing those goods, according to circumstances. In default of this agreement the Owners shall be responsible to the Company for all damage that might happen. Even if the true nature of the goods was declared on the Bill of Lading, such goods may be thrown overboard or destroyed by the Master of the Ship at any time without compensation to Owners, who shall be liable to the Ship for any loss or damage caused by such non-disclosure whether aware of the nature of the goods or not.

[fol. 41] 3. This cargo is received under the condition that, if it should be necessary to land it at any way port, on account of the Owners having failed to comply with the Customs regulations, or through their not having paid the respective dues, the Company will not be responsible for any delay in delivery or damage which may occur in consequence; and the risk and the expense of the landing at such way port will be for account of the Owners of such cargo. The Company shall have a lien upon the cargo until the dues and fines have been paid.

If, at any time, in the opinion of the Master of the Steamer carrying or intending to carry the goods, the passage through the Panama Canal would be unsafe or likely to delay the Ship, he shall have liberty to transship the goods to craft or shore and forward them over Isthmus to Colon by craft or rail, at the risk of the Owners of the goods, thence to be shipped to destination by other carrier;

or to retain the goods on board and proceed on his voyage via Magellan Straits.

All storage charges when incurred on the Isthmus, or at any place of transshipment, are for account of the goods, and are to be collected at destination in addition to the freight.

4. The Company to be at liberty to transship the within named goods, and to forward same by steamer or steamers at the risk of the Owners, it being agreed that the Captain, Officers and Crew of the Vessel in transmission of the goods, as between the Owners thereof and the Company, are to be considered the servants of such Owner. Surtaxe d'Entrepôt at Continental Ports, if any, to be payable by and for account of the Owners.

[fol. 42] 5. All fines and expenses, or losses by detention of Vessel or cargo, caused by incorrect or insufficient marking of the packages, or by incomplete or incorrect description of weight (or any other particulars required by authorities) either upon the packages or the Bill of Lading, or resulting from nonobservance of Consular, Custom or other Regulations, shall be paid by the Owners and the Company shall have a lien upon the goods until the payment of all such costs and charges.

6. Double freight to be paid on all goods incorrectly declared.

7. The Company will in no case be liable for any amount above £50. for any package, nor for Gold, Silver, Bullion, Specie, Documents, Jewellery, Money, Works of Art or other Precious Articles unless Bills of Lading are signed therefore and the value therein declared.

8. No weighing on board to be allowed at Port of Loading.

9. The goods must be cleared at the Custom House and Bills of Lading handed in twenty-four hours before the Steamer's departure.

10. The cost of re-baggging or re-casing Ores, or any other cargo, if required, and all cooperage and mending charges, shall be paid by the Owner.

11. Regarding Shipments of Hides the Company is not responsible for marks, countermarks, numbers, quality or defectiveness of the same.

12. The Company is not answerable as to the shipment or unshipment of living animals, confided to their Ships; [fol. 43] they are neither responsible for accidents nor death during the voyage.

13. The Goods to be taken from board directly they come to hand in discharging the Ship, otherwise the Company is authorized to put them into lighters, or crafts, to land, and store them in dock or on wharf at the expense and risk of the Owners.—The responsibility of the Company ceases, as above mentioned, in all cases in the moment when the goods leave the Ship's deck. The Ship to be entitled to commence discharging immediately after arrival at port of discharge, irrespective of weather and to continue discharging without intermission at all hours of day or night and the goods to be received by the Owners as quickly as steamer can discharge, any custom of the port to the contrary notwithstanding. Any extra charges incurred for the Steamer's quick despatch to be paid by the Owners. All goods to be weighed or measured at being discharged in order to ascertain freight. The Charges for weighing etc. to be paid by the Owners, who also have to pay any excess of freight discovered and the Company to have a lien on the goods for such claims.

14. In case of Blockade or Interdict of the Port of Discharge, Delivery or Transshipment, or if the Ship incur risk of Quarantine at such or at any other port (whether included in the intended voyage or not) by entering or communicating with or remaining in such port, or if, without such Blockade or Interdict, or in the Master's opinion it would be unsafe or likely to delay the ship or be otherwise injurious to her intended voyage to enter or communicate with or remain in such port owing to actual or expected [fol. 44] War, Civil Disturbances, Strikes or Lock-outs, Earthquake, Epidemics, State of the Weather, Congestion of the Port, or any cause whatsoever, the Master shall have the option and is hereby authorized to discharge the Goods into Depôt, Hulk, Craft, or other Vessel, necessary for the Ship's despatch, or at such other port as may, in

the opinion of the Master or the Company, be convenient, in all cases at Owners' expense and risk, and such discharge shall be a full and complete performance of this Contract by the Company (freight being payable in full), whose responsibility shall cease on the goods leaving the Ship's tackle.

In case of War, the Company shall have the faculty of detaining the Steamer in any port without responsibility for any delay in delivery, or many cancel the voyage and land the goods wherever they may deem convenient, at the risk and expenses of the Owners and without the Owners being in any way entitled to indemnification. The Company alone shall decide the reasons which may render such detention advisable.

All quarantine expenses upon the goods of whatever nature and kind to be likewise paid by the Owners.

15. In case the goods cannot be discharged during the Ship's stay at the port of delivery, by reason of the state of the weather or other cause, or have not been discharged by mistake or if they have been overstowed, or if they cannot be found, they may be delivered on her return or be sent back at the Ship's expense, but at the Owners' risk, the Company no- to be responsible for loss or claim arising from delay, sea or other risk. In all case- the Company's responsibility to cease when the goods have left the Ship's deck.

[fol. 45] 16. In case the Ship is prevented by Ice from reaching Hamburg, the privilege is reserved, at Ship's expense, but without Ship's risk, to discharge and store the within named merchandise at Cuxhaven or Glückstadt, either on shore or in lighters or crafts to be forwarded to Hamburg by lighters, at Ship's expense, but without Ship's risk, as soon as practicable, or eventually from Cuxhaven or Glückstadt, at Ship's option, by railroad. In all cases the Company's responsibility to cease when the goods have left the Ship's deck.

17. For through freight to ports beyond Bremen and Hamburg, the Ship has the privilege to discharge and store the goods at intermediate ports, either on shore or in lighter at Ship's expense, but without Ship's risk, and to forward the same to its Port of Destination as soon as

practicable and the goods are subject to all conditions, stipulations and exceptions expressed in the customary form of Bill of Lading in use at the time of shipment by parties carrying this property.

18. If on a sale of the goods at destination for freight and charges the proceeds fail to cover said freight and charges, the Company shall be entitled to recover the difference from the Owners.

19. Weight, Measure, Quality, Marks, Numbers, Contents and Value although mentioned in the Bill of Lading to be considered as unknown to the Masters unless expressly recognized and agreed to the contrary. Simple signature not to be considered as such agreement.

20. General Average, if any, to be adjusted at the Company's option either at Bremen/Hamburg or at final Port [fol. 46] of Destination; always according to York-Antwerp Rules, and as to matters not therein provided for, according to the usages of the place where the adjustment is made up. In case of General Average the contributing value of the ship shall be taxed obligatory in a German port. For this purpose the Owners are bound to declare, if required, the value of the goods and no goods will be delivered without security having been given by the Owners for the due payment of such General Average. Default, Error, Neglect in judgment or mistake of the Pilot, Master or the Crew in the navigation of the Ship, Defects of the Vessels or her Engines not noticed before and occasioned during the voyage shall not release the Owners from such contribution.

21. Cargo for Havre. The ship has the right to discharge day and night, and to stow Goods on the Quay or under the Shed without giving previous notice to Owners, and before weighing or counting, at the risk and expense of Owners, notwithstanding all Customs or Regulations of the Port of Discharge to the contrary. It is also agreed that all expenses of weighing, measuring and counting cargo, even for determining amount of freight due on weight, quantity or number delivered, shall be paid by the Owners at the rate of 2½% on total amount of freight. Porterage of the delivery of the cargo to be done by the

Company at the risk and expense of the Owners of the cargo.

22. Goods for discharge at Antwerp to be received through the Corporation appointed by the Captain or his Agents, Owners paying master porterage at current rate.

[fol. 47] 23. Cargo for ports not called at by the Steamers of the Company to be forwarded to destination either by Railway, Steamers, Lighters or other Conveyances at the discretion of the Company on the conditions of carriage of the Railway Company, Steamship Owners and other Companies conveying the cargo to its destination, the liability of the Company to cease on delivery to succeeding carriers. When any Bank, Railway, Dock or other Company accepts packages for store, conveyance or transhipment only at Owners' risk unless insurance or other Increased Rate is paid, the Company will in no case pay such insurance or higher rate for carriage or storage, unless expressly required by the Owners and/or Shippers of the goods to do so, the extra charges being payable by them.

24. The Company is not responsible for separate delivery of Marks at the Port of Discharge unless the cargo has been received separated by marks alongside the steamer in the Port of Loading.

25. The Owner of Optional Cargo must declare the option to the Agent of the Ship on or before the arrival of the Vessel at the first Port of Discharge, otherwise the Company is authorized to discharge the goods there.

26. Any claim made under this Bill of Lading will not be admitted unless notice in writing properly attested is given within ten days from date of arrival of Ship at Port of Delivery; the Company will not be responsible or accept liability for any loss or damage which has been paid for by insurance, nor in any case for more than the invoice [fol. 48] value of the goods and charges at Port of Shipment, in no case for more than the market-value at Port of Shipment, at the time, when the goods have been shipped, (claim for damage or partial loss being ascertained and adjusted on the same basis), or at Company's option, the Company's liability is limited to £50—per freight ton, and

relatively for any proportion thereof, calculated upon any portion of the consignment that may be lost or damaged.

27. Freight for the said goods, without discount or deduction, to be paid as per margin, and to be based either on the gross weights, measurements, number or value respectively ascertained at the Port of Discharge and according to the conditions stated in the Company's Tariff, or at the Company's option exercised at any time on the Shipping or Bill of Lading weight, measurements, number or value respectively, it being expressly agreed that full freight on the whole shipment is to be considered as earned on shipment of the goods and must be paid, Ship and/or Cargo or any part thereof lost or not lost at any stage of the entire transit, or in the event of forced interruption of the voyage. Double freight will be charged on all goods not correctly described.

All charges for measuring, weighing and counting cargo even for determining amount of freight on quantity, weight or number delivered, shall be paid by Consignees, any custom of the port to the contrary notwithstanding.

28. The Company shall have a lien on all goods for unpaid freight and charges, whether payable in advance at [fol. 49] Port of Shipment or not, and for payments made, or liabilities incurred in respect of any fines, expenses, or losses stipulated herein to be borne by the Owners, or previously unsatisfied freights or charges, payments or liabilities in respect of any other goods for which the Company has a claim on such Owners, and for Inland and forwarding Charges, and the Company shall have the right to sell the goods by public auction, without notice, 14 days after exercise of lien, all expenses of exercise of lien and sale to be paid by the proceeds.

29. It is mutually agreed that all questions arising under this Bill of Lading are to be governed by German law to the exclusion of proceedings in the Courts of any other country and to be decided at Bremen. General Average as per clause 20.

EXHIBIT 2, ANNEXED TO STIPULATION

Eastbound

Hamburg-Amerika Line, North Pacific Service

European Representatives:

Antwerp, Grisar & Marsily.
Bremen, Carl Joh. Klingenberg & Co.
Hamburg, Hamburg-Amerika Linie, Deutsche Dampfschiffahrts-Gesellschaft "Kosmos" A. G.
Liverpool, E. H. Mundy & Co., Ltd.
London, E. H. Mundy & Co., Ltd., General Agents for the U. K.
Rotterdam, Wm. H. Muller & Co.

[fol. 50] United States Representatives:

Los Angeles, Los Angeles Steamship Co.
New York, Hamburg-Amerika Linie.
Portland, Columbia Pacific Shipping Co.
San Francisco, Sudden & Christenson, General Agents Pacific Coast.
Seattle, Sudden & Christenson.
Vancouver, Dingwall, Cotts & Co.

Bill of Lading

Received at Port of Shipment named overpage by agents for the owners of the vessel named overpage (the term Carrier hereinafter used being intended to include said vessel and any substitute or continuing Carrier) from the Shipper named on the back hereof, the packages described on the back hereof (hereinafter called the Goods, the Carrier's responsibility in respect of description thereof being limited as hereinafter provided), in apparent good order and condition, except as otherwise indicated; to be transported by vessel named on the back hereof, or failing shipment by said vessel, in or upon another or following vessel or vessels, (the term Vessel hereinafter used being intended to include said vessel and any substituted or continuing vessel), or connecting carrier to the destination named on

the back hereof or as near thereto as the Vessel can safely get, and there delivered in like good order and condition, in manner as hereinafter provided, upon payment of any unpaid freight and other sums payable by the Shipper, Consignee and/or assigns and/or said goods hereunder, to the Consignee named on the back hereof, or order if so provided, subject always to the

[fol. 51] Terms of this contract bill of lading which are hereby mutually agreed upon as follows:

1. The freight is adjusted in consideration of all the terms and provisions of this contract whether written, printed or stamped.

2. All particulars herein mentioned of the Goods, except only the number of packages with the marks thereon, are those declared by the shipper, and the same (including anything as to size, weight, value, quality, quantity or condition of contents or the like, implied by the character of packages designated) are unknown to the Carrier and shall not constitute, as against the carrier, any part of the Carrier's description of the Goods as hereby receipted for, but shall be deemed only representations of the shipper.

3. Freight and advance charges as indicated on the back, if prepaid or intended to be prepaid, shall be deemed fully and irrevocably earned upon receipt of the goods by the Carrier, vessel or goods lost or not lost, even though voyage is not begun or goods not loaded. All freight and charges due the Carrier shall be paid in United States currency, New York funds. If payable at destination payment shall be made at the current rate of exchange for United States gold on the day of vessel's entry in the Customs House, unless otherwise provided herein. The carrier shall have a lien on all goods on which freight and charges are due but unpaid and though prepayment may be acknowledged herein, the shipper, consignee and owner of the goods shall be jointly and severally liable for such freight and charges until actually paid to the carrier. Full [fol. 52] freight and charges shall be due to the Carrier on containers, whether part full or empty, on damaged or unsound Goods, but no additional freight shall accrue on any increase in weight or bulk of Goods, occurring through absorption of water during the voyage. In the event of

the Carrier being unable to collect all freight and charges due at destination occasioned by the unclaiming or abandoning of the Goods by consignees, the Carrier shall have the option of selling the goods at auction and the shipper shall be liable for any deficit, should the net proceeds of the sale be insufficient to cover the Carrier's freight and charges. Any surplus from the net proceeds of the sale after deducting the Carrier's freight and charges to be paid in exchange for the bills of lading properly endorsed. Freight and charges subject to correction. If weight or other information for freight purposes has been incorrectly given by shipper the expenses incurred, if any, to ascertain the actual weight, etc., shall become an additional charge on the Goods and shall be payable by shipper, consignee and/or assigns.

4. The carrier may substitute another vessel or vessels or transship the whole or any part of the goods by any other vessel, whether operated by the carrier or by others at the original port of shipment, or at any other place or places, and may forward the goods by other means when necessary but shall be under no obligation to do so. The vessel with the goods on board, either before or after proceeding toward the port of discharge may remain in port, proceed by any route and deviate from or change the advertised and intended route at any stage of the voyage and may proceed to and stay at any place whatsoever, although [fol. 53] in a contrary direction to or outside of or beyond the usual route to the said port of discharge, once or oftener, in any order, backwards or forwards, for loading and/or discharging cargo, fuel, stores or passengers, and/or for any purpose whatsoever that in the opinion of the carrier or master may seem advisable, and although pertaining to another voyage. This liberty is not to be considered as restricted by any words of this contract whether written, stamped or printed. The vessel may adjust compasses, dock and go on ways with or without cargo on board, before or after commencing the voyage and may sail without pilots, tow and assist vessels in all situations and deviate for the purpose of saving life or property.

5. In case the voyage is broken up or so far delayed or interrupted as to make it unreasonable so to do, the Carrier may forward the goods to or toward the port of des-

tination above named by another vessel or conveyance (either of the Carrier or of another), for which an additional freight shall be paid, or may store the same at the nearest practicable place; all at the risk and Expense of the goods, their shipper, owner, and/or consignee. Such forwarding or storage shall constitute a valid delivery under this contract, terminating all responsibility of the Carrier, provided that reasonable notice be dispatched to shipper or consignee; but the Carrier shall retain a lien on the goods for all proper charges and expenses. If salvage services be rendered to the Goods by the Carrier they shall be paid as fully as if rendered by strangers.

6. The Carrier shall not be liable for loss, damage, delay, or default occurring from any of the following causes: [fol. 54] Acts of God; restraints of princes, rulers, and people; barratry of master or crew; enemies; pirates; robbers or thieves, whether within or without the ship; war; hostilities; riots; civil commotions; strikes; lockouts; stoppage or disturbance of labor; pestilence; epidemics; perils of the sea and other waters; fire, whersoever occurring and means used to extinguish the same; explosion, wheresoever occurring, including explosion of any of the other Goods; floating mines; bursting of boilers; breakage of shafts; accidents to machinery; collision; jettison; stranding; delay; detention; prolongation of voyage; accidents of or damage incident to navigation, transportation, or storage of whatsoever kind and wheresoever occurring; risk of craft, hulk, or transshipment; latent or other defect in hull, machinery, or appurtenances of vessel or any craft or unseaworthiness thereof, although existing at the time of shipment or at beginning of voyage if not discoverable by due diligence; floods; effects of climate; heat; cold; ice; wetting by sea water, rain or otherwise; snow; earthquakes; fumigation; sweat; decay; rust; stains; ferment; drainage; leakage; breakage; shrinkage; loss of weight or contents; evaporation; inherent defect, quality, or vice of the goods; vermin; rat damage; land damage; falling or destruction of wharf, shed, or warehouse; condition or insufficiency of packages or wrappers, or injury to or soiling of same; obliteration, absence or insufficiency of marks, numbers, address or description; stowage or contact with, or smell, leakage, or taint from, or any acci-

dent to, any other Goods (the vessels being privileged to carry any lawful merchandise, whether hazardous or contraband or not, including live stock as cargo or other- [fol. 55] wise, on or under deck); seizure or detention by process issued by any court or civil authority, any act, omission of the shipper, owner, or consignee of the goods or their representatives; saving or attempting to save life or property at sea or any deviation in rendering such service; any cause (whether or not of the kinds above enumerated) beyond the carrier's reasonable control.

7. General Average shall be payable in accordance with York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the port of New York. All General Average statements shall be prepared at the vessel's final port of discharge or elsewhere at the carrier's option. If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the vessel, or from any latent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril. The general aver- [fol. 56] age statement is to be made up in American Gold Dollars or in British Pounds Sterling or in Reichsmark at shipowner's option. The shipowner is entitled to require a deposit in any of these three currencies.

8. This shipment is subject to all the exemptions and limitations from liability contained in the act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to the Navigation of Vessels, etc.," even though the vessel be not transporting

property to or from any port in the United States. In the event of shipment being made from a Canadian port the shipment is subject to all the terms and provisions of and all exemptions from liability contained in the water Carriage Goods Act, 1910.

9. The Carrier shall not be liable for any articles enumerated in Section 4281 of the United States Revised Statutes, except in accordance therewith and after written notice of the true character and value of such goods, given at the time of loading and increased freight paid.

10. Unless a higher value be declared in the dock receipt at time of shipment and stated herein the value of the Goods does not exceed $8.00 per cubic foot or $100.00 per package or piece. The freight thereon has been adjusted on such valuation, and no oral declaration or agreement shall be evidence of a different valuation. In computing any liability of the Carrier in respect of the goods no value shall be placed thereon higher than the invoice cost (including prepaid freight hereunder) not exceeding $8.00 [fol. 57] per cubic foot, nor in any event $100.00 per package or piece (or such other valuation as may be stated herein), nor shall the Carrier be held liable for any profits or increase of price or value over such cost not exceeding such value, nor for any special or consequential damage and the Carrier shall have always the option of replacing any lost or damaged Goods. In case of partial loss or damage, the Carrier shall not be liable for more than such proportion of the same as $100.00, or the value declared bears to the actual value.

11. The Carrier shall not be liable for any loss, shortage of or damage to Goods, or delay in delivery of the same, unless notice of claim therefor be presented in writing to the Carrier or to the master or agent of the vessel before removal of the Goods. No suit or proceeding to recover for or upon any claim or demand shall be maintained against the Carrier or Vessel or Owners thereof unless commenced and summons served upon the Carrier within six months after the delivery of the Goods to the Carrier, and the lapse of such period shall be deemed a complete bar to recover in any such suit or proceeding not sooner commenced, notwithstanding the Carrier may be a non-resi-

dent or a Foreign Corporation. In no case shall the total liability of the Carrier to all claimants in respect of damages arising from any casualty exceed the value of the owner's interest in the vessel, or her wreck and pending freight. Nothing shall be deemed a waiver of the provisions of this article except a written waiver signed by the Carrier.

12. In case of any loss or damage for which the Carrier shall be liable, the Carrier shall to the extent of such lia-[fol. 58] bility have the full benefit of any insurance that may have been effected upon the Goods or against said loss or damage and the Carrier may deduct from any claim hereunder the amount of any loan made by any insurer on the goods pending any claim for the insurance on such goods.

13. If, because of conditions, actual or reported, at or near the port of discharge, such as war, hostilities, insurrections, civil commotion, blockade, interdict or any other regulation of any government, or of conditions of the sea or weather, epidemic, disease, quarantine, disturbance of labor, congestion of wharves, lack of discharging facilities, or of any other conditions (whether of like nature to those named or otherwise, and whether existing or anticipated) not due to the carrier's fault, the master shall reasonably decide that it is unsafe or impracticable to proceed to the said port or discharge the goods there, or that the discharge of the cargo is likely to be unreasonably delayed there, or that entry of the port of discharge or communication therewith may render the vessel liable to quarantine at any subsequent port, then the master may, according to his judgment, retain the goods on board for delivery on return to the said port or may either (1) store the goods ashore or on lighters or craft at the port or place where the vessel then is or at the nearest practicable place, or (2) store the goods ashore or on lighters or craft at the port of destination or the nearest practicable place thereto, or at the port nearest thereto to which the vessel is bound, or (3) forward the goods from any place and by any route to or toward the port of destination by such carrier or con-[fol. 59] veyance as may be advisable; all at the risk and expense of the goods, their shipper owner and consignee. Such disposition of the goods shall constitute a final delivery thereof, terminating all responsibility of the Car-

rier, provided that proper notice of such disposition be dispatched to shipper or consignee; but the Carrier shall retain a lien on the goods for all proper charges and expenses.

14. The vessel may commence discharging immediately on arrival in the roadstead, harbor, bay, river, or at quay and discharge continuously, any custom of the port to the contrary notwithstanding, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival; and if the goods be not taken from the vessel by the consignee directly they come to hand in discharging the vessel, the master or vessels agent shall be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered and the vessel's responsibility ended, upon dispatch of reasonable notice to the shipper or consignee; landing expenses, state tolls, or quay dues, if any, for account of Goods; the vessel and Carrier shall have a lien on such goods until the payment of all costs and charges so incurred. If any goods should not be found during usual stay of the vessel at port of destination or trans-shipment, but are landed at another port of discharge or trans-shipment, they shall be sent back at the Carrier's expense but at the risk of the Goods and the Carrier shall not be liable for any loss, damage or delay by reason thereof. In case the consignee receives the correct [fol. 60] number of packages, but it is thereafter discovered that packages consigned to him have not been delivered to him, he shall be required to return all packages erroneously received, before being entitled to the delivery of any of said packages consigned to him.

15. Goods on wharf, craft or lighters awaiting shipment, trans-shipment, or delivery shall be at risk of their shippers, owners and consignees as regards loss or damage not due to the Carrier's fault. The Carrier may convey the goods to or from the Vessel in the craft, lighters, carts, or other conveyances at the risk and expense of the goods.

16. The shipper shall be liable for any loss, expense, damage, or delay of or to Carrier, vessel, cargo, lighter, or wharf caused by inflammable, explosive, noxious, or dangerous goods shipped without full disclosure in writing of their nature prior to their delivery to Carrier and entry

thereof on this bill of lading, whether such shipper be principal or agent and whether or not he be aware of their nature. Such goods may be destroyed by the Carrier at any time without compensating the owner of the goods.

17. In case of a single article or package exceeding two tons in weight the true weight thereof shall be declared at time of delivery to the Carrier; in case the weight declared is incorrect and in consequence of reliance thereon any loss or damage arises, either to the article or package, or to the Carrier or to others, or any increased charges or expenses are incurred by the Carrier in handling or caring for any such article or package, the same shall be borne and paid solely by the Shipper, Consignee and/or assigns.

[fol. 61] 18. All export or import licenses and all consular, board of health, or other certificates or documents required by the authorities of any country in connection with the carriage of the goods must be furnished by the shipper; and Shipper, owner, and consignee shall be liable for any penalties, loss of time, or damage sustained by vessel or cargo, by reason of the absence, delay, or incorrectness of such licenses, certificates or documents, and the goods shall be subject to a lien therefor. Bills of lading must be made out in accordance with the regulations of port, customs, and consular authorities.

19. In addition to the liens hereinbefore provided, the Carrier shall have a lien on the goods for all expenses, fines, liabilities, and damages which the Carrier, vessel, or Goods may suffer through illegal, incorrect or insufficient marking, numbering, or addressing of goods or description of contents; or through any illegal or improper act of shipper, owner, or consignee; as well as for all other sums due from shipper, owner, consignee, or goods to the Carrier. All liens to which the carrier is entitled by law, or under this bill of lading shall continue after delivery of the goods until satisfied; and the shipper, owner, and consignee shall be liable for the amount thereof.

20. If the Carrier entrusts the goods to any other carrier, warehouseman, lighterman, forwarder, or conveyance to be forwarded to any place at which the vessel does not call (which the Carrier is hereby authorized to do), such other carrier, et al. shall be regarded as exclusively the

agent of the shipper, owner, and/or consignee of the goods [fol. 62] and shall alone be responsible; and the Carrier shall not in any event be liable for any act or default of such other carrier, et al., and storage, forwarding or carriage by such other carrier, et al., and shall be at the expense of the goods and subject to the provisions of the contract customarily used by such other carrier, et al., and delivery to such other carrier, et al. shall constitute a final delivery under this contract, terminating the liability of the Carrier.

21. In the event of war or hostilities existing or threatened, the goods shall at all times be at the sole risk of the owners thereof of arrest, restraint, capture, seizure, detention or interference of any sort by any power; and the Carrier and its representatives are privileged in their absolute discretion, if deemed advisable for the protection of the vessel or of any cargo or to avoid loss, damage, delay, expense, or danger, either with or without proceeding to or toward the port of discharge or entering or attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to or remain at any other port or ports, including the port of shipment, once or oftener in any order or rotation, retaining the goods on board or discharging the same at the risk and expense of the owners thereof at such port or ports at the first or any subsequent call, and full freight and all other charges shall be paid by the shipper, consignee, and or owner, and the goods shall be subject to a lien therefor. Upon such discharge, notice thereof shall be mailed to the consignee, if named, also to the shipper, and upon mailing of such notice the goods shall be deemed fully and finally delivered and the carrier discharged of all lia- [fol. 63] bility in respect thereto, but shall retain a lien until payment for all costs, charges and expenses incurred. The vessel shall also have liberty to proceed via any route to destination and to deviate in the course of the voyage or to remain in port as master may deem best. If the vessel is covered by war risk insurance conducted under Government auspices, she may comply with any direction as to departure, arrival, route, ports of call, stoppages, or otherwise given by any person, agency, or organization having the right, under the forms of such war risk insurance, to

give such directions; and so doing shall not constitute a deviation.

22. The Carrier shall not be responsible on shipments of lumber, logs, staves, laths, etc., for number of pieces in bundles or broken bundles, nor for splits, cracks, flaws, or discoloration. Also, that for metal in slabs, bars, ingots, rods, hoops, plates, etc., or any other article not properly packed but shipped loose or in bundles, the Carrier is not responsible for loss through breakage nor for the respective marks and/or weight and/or measurement, nor for the loss of broken pieces.

23. The cost of mending, repairing or replacing receptacles or packages containing the goods shall be payable by shipper, owner, and consignee, and shall be a lien on the goods. The carrier may apportion sweepings and unclaimed goods to consignees of like goods pro rata, and they shall be accepted as complete delivery. In case bulk shipments of similar goods under different bills of lading are stowed without separation, each bill of lading shall bear its proportion of loss or damage, if any.

[fol. 64] 24. Goods carried on deck shall be at the risk of the shippers, owners, and consignees thereof.

25. No claim shall, under any circumstances whatever, attach to the Carrier for failure to notify consignee or others concerned of the arrival of the goods.

26. The Carrier does not undertake to carry any goods or articles in refrigerated or insulated or specially cooled or ventilated compartments, and shall not be held liable for any loss or damage for failure so to do, unless such carriage is expressly stipulated for herein.

The Carrier undertakes that, before loading cargo requiring refrigeration into the refrigerated or insulated or specially cooled or ventilated compartments, it has obtained or will obtain from one of the Classification Societies, Registries or Bureaus or from their local representative or nominee in the port of loading, or, in the absence of such representative at the loading port then at the last preceding port of call where the services of such representative or nominee may be available a certificate stating that the refrigerating machinery and the refrigerated or

insulated or specially cooled and ventilated compartments have been surveyed and found by the surveyor to be in good condition and fit for the carriage of refrigerated cargo.

The production of such certificate shall be deemed to be conclusive evidence against the charterers, shippers, consignees or endorsees of bill of lading, that the vessel, her engines, machinery, refrigerating machinery, spare gear, equipment and insulation, were at the time of loading and at the commencement and during every stage of the voyage [fol. 65] in every respect sufficient and in a seaworthy and fit condition; and the existence of such certificate shall be deemed to satisfy and discharge every obligation or warranty, express or implied, to provide a seaworthy and fit vessel for the voyage or any stage thereof; and further, it is mutually agreed that the Carrier shall not be liable for any loss or damage occasioned by the temperature, risk of refrigeration, accidents to or explosion, breakage, derangements or failure of any refrigerating machinery or part thereof, whether or not arising from defects or insufficiency, either before or after shipment, in the vessel, her engines, machinery, refrigerating machinery or in any part of her refrigerating equipment, or any materials used in the process of refrigeration, and whether or not such loss or damage be caused by negligence, default or error in judgment, of any of the servants of the Carrier or persons for whom the Carrier is responsible, unless shown to have been caused by negligence of the Carrier from liability for which the Carrier is not exempt under the provisions of the Harter Act or the Canadian Water Carriage of Goods Act.

The above exceptions are to be read in addition to, but absolutely unqualified by any other words, whether written or printed, appearing in this bill of lading, or implied therefrom, and full and complete effect shall be given to the aforesaid exceptions, anything to the contrary appearing herein notwithstanding.

27. Additional terms applying to following ports:

Liverpool—Freight payable on weight is to be paid on [fol. 66] gross weight landed from vessel, unless otherwise agreed to or herein provided, or, unless the Carrier elects to take the freight on Bill of Lading weight. The master porterage of the delivery of the cargo is to be done by the

Consignees of the vessel and the expenses thereof to be paid by the Consignees of the goods.

Glasgow—Agents of the Carrier to have the option of landing Goods at Glasgow or Greenock, they forwarding same by lighter or Railway at vessel's expense and shipper's risk. Also, porterage of the delivery of the Goods to be done by consignees of the vessel, at their tariff rates, at the expense and risk of the receivers of the Goods. Tonnage and shed dues payable by the consignee's of the Goods.

Hamburg—(A) The Carrier has liberty to discharge all, or part of the goods in any part of the river Elbe, and to forward such cargo in lighters or other craft to the port of Hamburg at shipper's risk, but vessel's expense.

(B) In case the vessel is prevented by ice from reaching Hamburg, the Carrier has the privilege of discharging and storing the goods at Cuxhaven or Glueckstadt, there remaining at the risk and expense of the goods until forwarded by lighter or other craft to Hamburg or at Carrier's option by rail. Such forwarding to be at Carrier's expense, but at the risk of the goods.

(C) Goods destined for points beyond Hamburg are subject to all conditions, stipulations and exceptions expressed in the customary form of Bill of Lading in use at the time [fol. 67] of shipment by Carrier or Carriers completing the transit. Also, that the goods be forwarded at Carrier's expense, but at the risk of the goods, from Hamburg direct or indirect by steamer, lighter and/or rail at Carrier's option.

(D) In case the final port of destination is closed by ice, or the last regular steamer of the season from port of transshipment is fully engaged, or already fully loaded, or in case the final port of destination is affected by disease, quarantine, war, hostilities, blockade, regulation of any government, civil commotion, stoppage or disturbance of labor, congestion of wharves, lack of discharging facilities or other conditions beyond the Carrier's control, the Carrier is at liberty to forward the goods to any other port apparently nearest accessible, to which a regular service is maintained, or to warehouse the goods at intermediate port or ports at the risk and expense of the goods, and to forward the said goods to destination as soon as practicable.

Full freight is due on goods thus forwarded and the terms of the through bill of lading are to be considered fulfilled in every respect. If owners of the goods desire transportation by rail it will be for their account. Should the owners of the goods desire to give special orders for the forwarding from port of transshipment they must do so at latest on arrival of the goods there and Carriers will comply with such orders as far as possible, but always at the risk and expense of the goods.

(E) Quay dues at Hamburg Reichsmark 0.50 per 100 kgs. (minimum G.-M. 0.30) to be paid by consignees any port regulations to the contrary notwithstanding.

[fol. 68] Antwerp—(A) In case the vessel shall be prevented by ice in the River Scheldt from reaching Antwerp, the privilege is reserved at the Carrier's expense, but without vessel's risk to discharge and store the within-mentioned merchandise at Flushing or other accessible point, in warehouses or lighters, to be forwarded as soon as practicable to Antwerp, by lighters or rail at the vessel's option and expense, but at the risk of the owner of the goods.

(B) Also, that in case the regular steamship service to final port of delivery should be suspended or interrupted, in consequence of ice or other causes, the carrier, at the option of the owner or consignee of the goods, or the holder of the Bill of Lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port of Antwerp at the risk and expense of the goods until regular service to final port of destination is opened again.

(C) Also, that the vessel may discharge day and night without interruption. Cargo to be landed and received for account of consignees by the corporation appointed by the steamer; consignees paying current rates. Watching of cargo for account of consignees at current rate. Consignees to remove goods from quay in Antwerp within 5 running days after their discharge (the goods during the time they are on the quay to be subject to the conditions of clause 11 and the other clauses of this Bill of Lading), failing which the master or vessel's Agent, to be at liberty to store the goods or put them into craft without notice (any

custom or rule to the contrary notwithstanding) at consignee's risk and expense.

[fol. 69]. Rotterdam/Amsterdam—(A) In case the Vessel is prevented from reaching Rotterdam or Amsterdam, by ice or otherwise, the privilege is reserved at the Vessel's expense, but without Vessel's risk, to discharge and store the within merchandise at either Hook of Holland, Flushing Zierikzee, Brouwershaven, Willemstad, Hellevoet, Nieuwediep, or Ymuiden, to be forwarded to Rotterdam or Amsterdam by lighters at the Vessel's expense, but without Vessel's risk as soon as practicable.

(B) Also, Sterling freight to be paid at the quoted short exchange on London on the date of the Vessel's report at the Custom House, but no less than twelve guilders D. C. to the £ sterling. Dollar freight to be paid at the quoted rate of cable exchange on New York on the date of Vessel's report at the Custom House, but not less than two and a half guilders D. C. to the dollar.

Bremen—The goods are to be delivered at the City of Bremen free of lighterage, and to be received without any summons after the vessel or lighter is ready to discharge at any public or private quay selected by the company (the responsibility of the vessel to cease immediately the goods are discharged) or they will be stored on the quay or in warehouses, or in hired lighters, at the risk and expense of the consignees. If the river navigation is impeded or threatened to be impeded by ice, the cargo to be stored in Bremerhaven, Nordenham or Geestemuende, on the quays, or in warehouses, lighters or steamers at the Carrier's option and at the risk of the consignees, and thence to be forwarded to Bremen by rail, at the expense and risk of the [fol. 70] consignees as soon as sufficient railway trucks are on hand.

Havre—The master-porterage of the delivery of the goods to be done by the consignee of the vessel, at the expense and risk of the receivers of the goods. Goods landed without marks, with wrong cut, or strange marks, to be apportioned by vessel's agent (or master-porter) among the consignees of goods whose -ots may be short.

28. Attention of shippers is called to Sec. 235 of the Penal Laws of the United States (Act of Congress, March 4,

1909), viz.: "Every package containing explosives or other dangerous articles, when presented to a common carrier for shipment, Shall Have Plainly Marked on the Outside Thereof the Contents Thereof and it shall be unlawful for any person to deliver or cause to be delivered to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive or other dangerous article under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without Informing the Agent of Such Carrier of the True Character Thereof, at or Before the Time Such Delivery for Carriage is Made. Whoever shall knowingly violate or cause to be violated any provision of the section * * * shall be fined not more than $2,000 or imprisoned not more than eighteen months, or both."

29. Nothing herein contained is to be taken as depriving the owner of any right to limitation of liability to which he would otherwise be entitled.

[fol. 71] 30. This Bill of Lading, duly endorsed, shall be given up to the Carrier's representatives in exchange for a delivery order.

31. The shipper, vessel, consignee, destination and goods referred to overpage as mentioned or describe- on this side (back) hereof are as follows:

Port of Shipment Seattle, Wash.—Shipper Cron & Dehn, Inc.

Vessel Isis 15 E—Owner of the vessel Hamburg-American Line

Bound for Hamburg via Bremen—Destination of Goods Hamburg, Germany

Consignee Cron & Dehn, Inc. or order.—Notify (If consigned to Shipper's Order) Mr. Ludwig Haymann Rolandhaus, Hamburg, Germany

B L 1

Shipper's Description of Goods

(Carrier's responsibility for description being limited as hereinbefore provided.)

Marks: (4C & D. Inc4)—Number of Packages, 1934. Description of Packages and Contents, Pieces Lumber said to contain 20,163 net ft BM. Gross Weight 67,210 lbs.

Rubber stamp—Certified-loaded-on-board—Sudden & Christenson, Agents)

(Rubber stamp—Copy not negotiable)

Ship not responsible for split-ing, chafage, stains or discoloration

Freight payable at Hamburg

32. And finally that in accepting this Bill of Lading, the shipper, owner, and consignee of the goods and holder of this Bill of Lading agree to be bound by all its provisions, [fol. 72] on this page and overpage, whether written, printed or stamped, as fully as if signed by all of them.

In Witness Whereof the Master or agent of the ship has signed Two Bills of Lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated at Seattle, Dec. 12th 1927

For the Master:

Sudden & Christenson, Agents, by H. B. Blair.

Freight charged on 20,163 ft. @ 70/- per M ft. 70-11-5

Total payable at Hamburg 70-11-5

[fol. 73] In United States District Court

[Title omitted]

Order of Reference—Dec. 2, 1930

The above entitled causes having been called by the Court on November 24, 1930, and the parties hereto having agreed that an order to hear and report might be entered therein, now, on said consent, and on motion of Haight, Smith, Griffin & Deming, proctors for the respondent, it is

Ordered that the above-entitled causes be and hereby are referred to Mark W. Maclay, Esq., as Special Commissioner, to hear the evidence adduced by the respective parties, and to report his conclusions thereon to the Court with all convenient speed; and it is further

[fol. 74] Ordered that said report of the Commissioner shall be advisory only and shall not be construed to be a determination of the issues; and it is further

Ordered that the Commissioner's fees and stenographic expenses of the reference be taxable against the unsuccessful party, unless the Court otherwise orders; and it is further

Ordered that, unless the time be extended by consent of the parties or by order of the Court, the Commissioner file his report on or before January 15, 1931.

(Sgd.) Woolsey, United States District Judge.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR SPECIAL COMMISSIONER TO FILE REPORT AND CONSOLIDATING ACTIONS—Jan. 13, 1931

Upon reading and filing the annexed affidavit of Mark W. Maclay, Special Commissioner, it is hereby

Ordered that the time of the Special Commissioner to file his report herein be, and the same hereby is, extended to [fol. 76] and including February 2, 1931; and it is further

Ordered that the above entitled actions be, and they hereby are, consolidated as one action, that they proceed henceforth as a single action, that such consolidated action be entitled Louis H. May v. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, and that the Special Commissioner appointed by order entered herein December 2, 1930, file a single report in said consolidated action.

Woolsey, U. S. D. J.

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION OF PAUL KRUEGER

Deposition Taken on Behalf of the Respondent at the Office of Messrs. Haight, Smith, Griffin & Deming, No. 27 William Street, New York City, 10:45 A. M., October 9, 1930.

Appearances:

Messrs. Haight, Smith, Griffin & Deming; William Denman, Esq. (Mr. Haight) for the respondent.

Messrs. McCutchen, Olney, Mannon & Greene; Messrs. Bigham, Englar, Jones & Houston (Mr. Longley) for the libelllant.

It is stipulated and agreed that the testimony about to be taken may be taken in shorthand and transcribed on the typewriter, the signing, filing and certification waived, two copies of the depositions to be furnished to counsel for the libellants, stenographic fees to be payable in the first instance by the respondent and to be taxable as costs.

[fol. 78] It is further agreed that the testimony about to be taken may be read in evidence in the above entitled cause, and also in the other causes pending in the United States District Court for the Southern District of New York, growing out of the same accident, and also may be read in evidence in the similar causes now pending in the United States District Court at San Francisco, California.

PAUL KRUEGER, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Haight:

Q. Captain Krueger, how long have you been with the Hamburg-American Line?

A. Twenty years.

Q. How long have you held master's papers?

A. Since 1906.

Q. You have served with the Hamburg-American Line in all grades?

A. Yes.

Q. Third mate, second mate, first mate and captain?

A. Yes.

Q. How long have you been in command of Hamburg-American Line ships?

A. Since October 1926.

Q. Were you in command of the "Isis" in February 1928, when she entered the Weser River, bound for Bremen?

A. Yes, sir.

Q. How long had you been in command of the "Isis" at that time?

A. A year and a half.

Q. You took command when?

A. In October 1926.

Q. Where had the "Isis" loaded?

A. At the North Pacific ports.

[fol. 79] Q. Name the ports, please.

A. First loading port Seattle, Tacoma, Vancouver, B. C., Portland, Oregon, San Francisco, and San Pedro.

Q. When your ship loaded at these six ports, please state whether or not you had a full complement of officers and men.

A. Yes.

Q. Were all of your officers in the deck force and the engine-room properly certificated?

A. Yes.

Q. They all had proper papers?

A. Yes.

Q. How long had your officers been with you?

A. Well, the officers—they change every trip nearly.

Q. Were the men, in fact, competent men—officers and crew?

A. Oh, yes.

Q. Please state whether or not your ship was in all respects seaworthy, properly equipped, properly fitted, at all of those ports.

A. Yes, sir.

Q. Was your cargo properly stowed?

A. Oh, yes.

Q. On the voyage from Seattle to Bremen, was there anything wrong with your personnel at any time, or with your ship or with her fittings?

A. No, nothing at all.

Q. How often had you navigated up the Weser River, before this particular voyage?

A. Four times altogether.

Q. Including this voyage?

A. Yes, sir.

Q. You had been up three times before?

A. Yes.

Q. How many times as captain?

A. Just two times—this was the second time.

Q. The first two times you went up the river you were mate?

A. Yes.

Q. I suppose that you almost always go to Hamburg?

A. Yes.

[fol. 80] Q. Did you have a pilot from Bremerhaven up to Bremen?

A. Yes.

Q. Who was giving the orders for the navigation of the ship?

A. On the river, you mean?

Q. Yes.

A. The pilot.

Q. You stranded on the trip up?

A. Yes.

Q. Please tell me how that happened.

A. Why, we came in—we got into fog, and we have to anchor there in fog, because the channel is very narrow, we can't get further up, so we had to drop anchor.

Q. How suddenly did the fog shut in?

A. Why, just so we had to drop anchor.

Q. Was it a sudden fog, or did you start navigating in the fog?

A. No, the pilot said, "I think it is going to be very thick, so it is better we drop the anchor here."

Q. When you started from Bremerhaven, was the weather all right?

A. Yes, clear weather.

Q. When you dropped your anchor, what was done with your engines?

A. Well, I keep the engines going astern, just keep her in the center of the channel.

Q. How was the tide running?

A. It was a little flood tide, it was just about 20 minutes before high water.

Q. Could you see the range lights before you anchored?

A. Yes, I could see the range lights forward and aft, and the range lights showed we were in the center of the channel.

Q. Your anchor was dropped—where, with reference to the center of the channel, was your anchor, as far as you know—how near the center of the channel did you drop your anchor?

A. It was just the middle.

Q. How much chain was let out?

A. 30 fathoms.

[fol. 81] Q. Whose orders?

A. Pilot's orders.

Q. What happened after you anchored?

A. After we anchored, it was very thick, we couldn't see anything, we couldn't see the shore on each side, so we just keep our engines going to keep her in the center of the channel, and then the ebb tide sets in, she was all right. I sounded 5½ fathoms of water, I says that she is all right, and later on I saw the ship was on the ground. I asked the pilot if there is any danger for the ship, and he said no.

Q. What had happened to put her aground?

A. Well, we couldn't see anything, we didn't know.

Q. Which way did she swing?

A. She didn't swing at all, she just came alongside the starboard shore and was fast on the ground.

Q. She must have swung in towards the starboard bank.

A. No, she went over right to the starboard bank (indicating).

Q. You mean broadside?

A. Yes.

Q. What happened after the ship got ashore?

A. Well, she was laying there in the soft mud, and the pilot says "there is no danger at all for the ship here", and two tugboats came alongside and wanted to tow us up from there, you know, but they didn't know whether we were just in the fog or at anchor, they came alongside and made fast alongside, so I asked the two tugboat captains if there is any danger for the ship here to lay on the beach—"Oh, no, there is all soft mud, there is no danger at all". I told them to stay there, and as soon as we get afloat to help us.

Q. Go ahead. This isn't particularly important, but I just wanted to outline the story.

A. And then about four hours before high water, the ship was afloat aft, but she was then about 4 feet—what you call it——

[fol. 82] Q. 4 feet aground?

A. 4 feet aground on the forward end.

Q. And what happened?

A. The heavy wind came up from our starboard quarter and swung the ship off four hours before high water, and she went over to the port side of the bank——

Q. That is, the stern swung off and the bow was still aground?

A. Yes. She swung off to the port side of the bank. We was trying to get her in the middle with our engines and put the rudder hard to the port side—hard over—but the two tugs couldn't hold her either. They had a tow rope fast on our stern and they couldn't hold her either. So the ship went over to the port—to our port bank—to the port bank.

Q. Over to the bank on your port side?

A. On our port side, and the rudder was hard over to the port side at that time, and she struck with her stern on the port side of the bank.

Q. Well, did you subsequently find what damage had been done, when she struck the bank?

A. No, not right away.

Q. Well, when did you find that?

A. I lift up my anchor—she was coming afloat then afterwards forward too—I lifted up the anchor and went up the river to Bremen but I couldn't move my wheel to the starboard, because the rudder was hard to her port side when we struck the bank, and it was something happened with the rudder, but I couldn't see it and I didn't know what it was.

Q. At that time?

A. At that time. So I saw the ship was sheering out to the starboard side all the time very fast, and the two tugs they couldn't hold her, so I dropped the anchor again and ordered another three tugs——

Q. And with the five tugs——

A. With the five tugs then I lifted up my anchor, and with [fol. 83] the five tugs went up to Bremen, but the ship was always sheering to the starboard. I made fast with two

tugs, one on each side aft, and the three tugs ahead forward.

Q. Tell me again about your wheel. You couldn't turn the wheel to starboard?

A. No, I couldn't turn the wheel to starboard.

Q. The rudder would turn how?

A. The rudder was hard aport when the rudder blade was amidships.

Q. You mean the wheel was hard aport?

A. The wheel was hard aport when the rudder was amidships.

Q. The wheel was hard left?

A. Hard left.

Q. When the rudder was amidships?

A. Yes.

Q. And when the wheel was amidships, where was the rudder.

A. Hard astarboard, but I found out later.

Q. What did you find out later?

A. Well, when we were in port——

Q. What was the first examination made of your rudder?

A. In the port of Bremen, when the ship was discharging the Bremen freight, I had a diver there from that Weser Shipyard, and Captain Wuhrman's instructions.

Q. Captain Wuhrman was of the Weser Shipyard?

A. Yes, he was the dock master there—and Captain Reichenbacher and me, we stood on the pier and watching the diver what he was doing. The diver came up after the first time and said he can't find anything—everything is straight and in good condition.

Q. The diver was sent down while you were discharging cargo?

A. Yes.

Q. To do what?

A. To examine the rudder—the rudder blade.

Q. To find out what was wrong with it?

[fol. 84] A. Yes, sir, and Captain Wuhrman, he sent him down three times after that, but as soon as the diver came up he always said, "I can't find any damage on the rudder blade"—that was on the 8th of February, and we finished discharging, and Captain Reichenbacher says to me, "It would be safer if we were in the drydock with the ship and see if the diver said right about the rudder."

Q. Was the ship drydocked?

A. Yes.

Q. On what date?

A. On the 9th—on the 9th of February.

Q. In what dock?

A. In the Weser dock—Weser Shipyard Dock.

Q. Where were you when the ship was docked?

A. I went off the boat and went on the dock, and there was a little bridge behind the boat, we put that over when the boat was in dock.

Q. Running from one side of the dock to the other?

A. Yes. I went on this bridge, right in the middle, and watching our rudder blade, and Captain Reichenbacher, Captain Wuhrman, Mr. Schubert——

Q. Who was he?

A. He was an engineer.

Q. Representing whom?

A. Hamburg-American Line—and Mr. Mench from the shipyard—he was chief engineer of the shipyard.

Q. Where were they?

A. They went down in the boat and examined the rudder.

Q. Before the water was pumped out of the dock, they got in this boat?

A. Yes.

Q. And went where?

A. Went aft.

Q. How long did you stand on the bridge?

A. Well, I was standing there when the rudder blade was about half out of the water.

Q. And the men were in the boat then?

A. Yes.

Q. Then where did you go?

[fol. 85] A. I went on the side—just aft—and watched what they were doing.

Q. While you stood on the little bridge aft of the stern, could you see the rudder clearly?

A. Yes.

Q. What time of day was it?

A. It was after 5 o'clock—it was just before dark.

Q. Was there plenty of light then to see, at 5 o'clock?

A. Yes. I could see all right when the rudder was about halfway out of the water.

Q. Please state what angle the rudder was at, as you stood and watched it.

A. It was just the middle—when I was on the bridge.

Q. How did the blade appear—was it bent or straight?

A. So far as I could see, the rudder was absolutely straight.

Q. The bridge I refer to is the one running across from one side of the dock to the other, aft of the ship?

A. Yes, that is right.

Q. When you left that little bridge and went onto the side of the dock, what happened?

A. Well, then I was standing there all the time when they were pumping out the water, and Captain Reichenbacher and the other men, they were all down the same time and examined the rudder, and later on——

Q. How were they examining it?

A. They were feeling down with their hands and sticks, when the water was pumped out about to the second arm—second starboard arm of the rudder blade.

Q. Next to the bottom arm?

A. Next to the bottom arm.

Q. Then what happened?

A. So Captain Reichenbacher came up on the dock and we went onto the boat and turned the wheel from one side to amidships and back again.

Q. Where were you when he did that?

A. I was there too in the pilothouse.

[fol. 86] Q. You went on the bridge and into the pilothouse with him?

A. Yes.

Q. What did he do?

A. We turned the rudder and see how it was working.

Q. What happened?

A. Well, we turned the rudder from our port to the amidships, from the left to the amidships, and back again, we couldn't turn it to the right.

Q. It was just as it was when you started coming up the river?

A. Yes.

Q. Was somebody watching the rudder blade aft while you were turning the wheel in the wheelhouse?

A. Yes.

Q. How much could you turn the rudder blade?

A. Just from the starboard side to the amidships.

Q. And the wheel, you could turn how?

—A. The wheel was just the same.

Q. From amidships hard left?

A. Yes.

Q. It wasn't just the same?

A. No—from amidships to hard left.

Q. After you had made this test, what did Captain Reichenbacher and you do?

A. Then we found out the rudder blade was absolutely straight, and we talked it over, and we said "We will have to lash the rudder amidships."

Q. How about the light at that time?

A. Well, it was dark at that time before we were through with everything there, we put a searchlight out there on the after end of the ship and——

Q. Electric?

A. Electric, yes, and they went down again in the boat and they could look down into the water.

Q. While you were up on the bridge with Captain Reichenbacher, what was being done with reference to the pumps in the drydock?

A. They were pumping all the time, but only to about 2 feet above the lower arm—lower rudder arm.

[fol. 87] Q. When you came back and they rigged up the searchlight, how much water was there then over the bottom of the rudder blade?

A. Well, that was about 2 feet.

Q. Who went in the boat this last time?

A. All the same men.

Q. What did you see them doing at that time?

A. They had a searchlight, and then they looked it all over from one side to the other, and they feel down with the hands and sticks.

Q. What did you finally find was wrong with your rudder?

A. Well, I saw them—I talked this over with Captain Reichenbacher—and I said "The paint is cracked off on the rudder shaft, there may be a twist in the shaft," and there was a twist.

Q. It was the rudder stock?

A. Yes.

Q. Which had been twisted?

A. Twisted.

Q. Did you later, when the ship went to Kiel for repairs, see the rudder stock?

A. Yes.

Q. Please state whether or not the rudder stock was one piece or two pieces.

A. The stock was two pieces.

Q. Please look at the blueprint which I show you. Is that a blueprint of the "Isis"?

A. Yes.

Mr. Haight: I will offer that in evidence.

(It is marked Respondent's Exhibit 6.)

The Witness: I saw the whole rudder when they put it ashore at Kiel. They took it off here (indicating).

Mr. Haight: Indicating with the point marked with the letter "X."

Q. They separated it there (indicating "X")?

A. Yes.

[fol. 88] Q. And then what did they do?

A. They took it all out. They took the blade below the "X" out——

Q. That came out in one piece?

A. Yes.

Q. And they took the stock above the letter "X" out?

A. Yes.

Q. How many pieces were there there?

A. One.

Q. What is this (indicating the drawing at the letter "Y") between the blade of the rudder and the quadrant?

A. That is the stuffing box there.

Q. To keep the water from running into the compartment above it?

A. Yes, keeping the water, and keeping the rudder stock a little stiff and straight.

Q. What was done to your rudder before you left Bremen?

A. We lashed the rudder, the rudder blade, with wires up to the ship's—to each side, and put on the screws of the quadrant.

Q. How did you lash it?

A. We lashed it right amidships.

Q. But where did you fasten the lashings—how did you pull them taut?

A. Where we fastened—we fastened the lashings up on deck on the bitts each side, and the screws we turned tight on the quadrant.

Q. How did you pull your lashings taut—by hand or otherwise?

A. By tackles.

Q. Were the lashings tight?

A. Yes, absolutely tight.

Q. Did you see your rudder after it was lashed?

A. Yes.

Q. Please state whether or not it was straight?

A. Yes.

Q. It was?

A. Yes, it was straight.

Q. How many screws were made fast on your quadrant?

A. There is only one—yes, only one there.

[fol. 89] Was that screwed down tight?

A. Yes.

Q. Did you see it yourself?

A. Yes.

Q. Was the lashing of your rudder blade started before or after dark?

A. Well, they started just a little before dark, and they finished in the darkness.

Q. Could you see when the blade was first made fast——

A. Yes.

Q. (Continuing) —whether it was or was not straight?

A. It was straight.

Q. Please state whether or not in your opinion the rudder blade itself was fair when you left Bremen?

A. Yes, it was absolutely amidships and straight.

Q. How many tugs did you take when you started down the river the early morning of February 10th—it was the 10th, wasn't it?

A. Yes—three tugs.

Q. What was their total horsepower?

A. 2,690.

Q. What was the total horsepower of your ship—both engines?

A. 2400.

Q. That is, the tugs had more power than you had?

A. Yes.

Q. Did you have any discussion with Captain Reichenbacher as to how many tugs you should take?

A. Yes, he asked me how many I wanted. I said three tugs of that size, in my opinion, is just enough, it is plenty for her, we don't need any more, and he said, "If you want more you can have them."

Q. You said "Just enough"?

A. Yes.

Q. Did you mean that——

A. Well, not just enough—it was plenty, I say.

Q. Could you have had more tugs if you had wanted them?

A. Yes, I could have more, but I didn't need them.

Q. How do you know you could have had more?

[fol. 90] A. He told me "You can have so many you want."

Q. At the present time, Captain, I want your best judgment as to whether or not those three tugs, with a total horsepower of 2,080, were strong enough to handle that ship down the river if she were properly navigated?

A. Oh, yes.

Q. How were the tugs made fast?

A. The strongest tug of 1,080 horsepower, he was made fast forward, and the other two tugs, one on each side opposite No. 4 hatch.

Q. Do you know the names—which was on the starboard and which was on the port side?

A. On the port side, "Lankenau," and the starboard side "Eversand," and the head was the "Hoheweg."

Q. Who was it that gave the orders where the two tugs should make fast alongside?

A. Well, I talked this over with the pilot, and the pilot said "It is best we take them off on No. 4 hatch," and I said "All right."

Q. Did you agree with him?

A. Yes.

Q. Please state whether or not in your opinion the tugs were properly located?

A. Oh, yes.

Q. If you have them toward the aft, have they more power in swinging your ship, for steering purposes?

A. Yes, we could swing a ship with that power any way they want them.

Q. The tug forward—how much hawser did she have?

A. One.

Q. And how long was the hawser?

A. About 30 to 35 meters.

Q. Did you see how the tugs alongside were made fast?

A. Yes.

Q. You supervised that yourself?

A. Yes, they made fast with springs forward and aft——

Q. Both forward and aft?

A. Both forward and aft—and head and stern line.

Q. Were they properly secured?

A. Yes.

[fol 91] Q. All lines?

A. Yes.

Q. Was the length of hawser 30 or 35 meters, in your judgment, the proper length for towing down the river?

A. Yes, that is just the length for towing up or down the river. We have to have them short like that.

Q. You have had experience in towing vessels in rivers before?

A. Yes.

Q. Not much in the Weser?

A. Not in the Weser, but in other rivers.

Q. In your judgment, was the amount of hawser used by the "Hohewëg" correct?

A. Yes.

Q. Had you received any orders, Captain, from anybody representing the Hamburg Line, with reference to the navigation of the ship down the river from Bremen?

A. No, none at all.

Q. Please state whether or not the pilot was in a position to do absolutely what he wanted, with reference to the navigation of the ship?

A. Of course. He knows the river and channel and the currents, and I don't know much about it, you know, I was—I don't know the Weser at all, but I know it better now.

Q. Was there anything to prevent the pilot from stopping his ship at any spot in the river or even from anchoring her if he had seen fit to do so?

A. Well yes, he told me before we left, "We have to tie up the ship further down the river in a place called Brake," because, he says, "There is another bank further down than

Brake," and he wants to pass this bank with the flood tide again.

Q. Up to the time that you reached the Lesum, where the second stranding occurred, how was the tide running?

A. It was flood tide.

Q. The current was against you?

A. Yes.

Q. Was there anything to stop the pilot from stopping his ship in the river or even anchoring her if he had wanted [fol. 92] to do so?

A. If he had wanted to do so, I couldn't stop him.

Q. But the physical conditions——

Mr. Longley: In view of the fact that the witness has said he was entirely ignorant of the conditions in the river, I must object to the question.

Q. The tide was running against you all the time?

A. Yes.

Q. From the time you left Bremen until you got down to the Lesum?

A. Yes.

Q. From the time you left Bremen early in the morning of February 10th, until you got down near the Lesum, how did your ship navigate?

A. Why, our ship navigated all right, we had no trouble with that.

Q. What speed did you make over the ground?

A. We made about 8 kilometers an hour.

Q. About what speed were you making through the water?

A. About 10 or 11.

Q. You think the current was 2 or 3 kilometers an hour?

A. Yes, maybe more than that. It was a high tide that night—or that day—and the current maybe a little stronger.

Q. What did you pass going down the river?

A. Well, when I came out of the port, I passed a little—well, I couldn't say a steamer, it was more a tugboat—a little further down—and then a couple of dredges on the port side.

Q. Where were the dredges?

A. They were about halfway down from Bremen to the Lesum.

Q. Did you have any trouble in getting by the dredges?
A. No.
Q. Or the little boat that you passed first?
A. No.
[fol. 93] Q. How close to the bank were the dredges?
A. Oh, they were close to—very close to.
Q. Did you later pass another ship in the channel?
A. Yes.
Q. How big a boat was she?
A. She was a bigger boat—about the same size as the "Isis."
Q. Where did you first see her?
A. Well, there is a bend above the Lesum, and I saw her over that bend coming up.
Q. About where was your ship when you saw the other one? Can you indicate about what kilometer you were at?
A. Yes (indicating on small chart), we saw her about on the 16th—a little before that—I saw from here about—over this bend.
Q. A little above the 16th kilometer?
A. Yes, I could see her coming up.
Q. Did the other ship continue her way up the river?
A. Yes.
Q. And where did you pass her?
A. I passed her just on the 17th kilometer—a little above the 17th kilometer.
Q. In the proceedings before the Seeamt, as I remember in some of the evidence in the pilot's report, it is suggested that you passed the steamer below "Moorlosen."
A. "Moorlosen"—that is a little boat I told you—tugboat or whatever it was—but we had no trouble with that one.
Q. The ship that was passed just before you reached the Lesum——
A. Yes.
Q. (Continuing) Are you sure of where in the river you did pass her?
A. Yes, I am sure. That was the boat that made all the trouble with us.
Q. Before you passed her, what change if any was made in your course?
A. Well, when I saw the boat, I spoke to the pilot, "What is happening now, we have to pass the boat in a very

[fol. 94] narrow channel," "Well," he says, "we have the middle of the channel," and he said "Well, we will change our course a little to the starboard."

Q. How far over towards the starboard bank did you swing to pass the ship?

A. Well, you can't swing very far, you know, that is too narrow there—that is just a little bit.

Q. Well, were you or were you not close to the starboard bank?

A. I was very close to—too close.

Q. What was the current at that time?

A. The current was against us, and a strong current too, as I found out later.

Q. As your head swung to starboard, where did the current strike you?

A. On our port bow.

Q. After you had passed this other steamer, what was done to get your boat back into the middle of the channel?

A. Well then, we tried to get her back—the tugboat ahead, she pulled out of the port side with full speed, and the port tug went full speed astern, and the starboard tug full speed ahead, and also our engines the same—the starboard ahead and the port engine astern.

Q. Well, did you succeed in swinging your boat back into the channel?

A. We tried to but we couldn't get her back.

Q. What happened to your starboard tug?

A. Well, when we came close to the Lesum bank, we was so close he couldn't get clear of that bank, so he let go his lines and went away.

Q. That left you then with only the port tug and the tug ahead?

A. Yes.

Q. What did they do?

A. Well, they tried the best they could, but they couldn't get us back to the center of the channel.

Q. As you came down towards the point of land at the Lesum there, what happened?

[fol. 95] A. The ship went more over to the starboard, and after we passed the buoy on the Lesum bank—there is a little buoy ahead of the bank—we passed that buoy—you can't see it on this map——

Q. Those black spots are lights, are they?

A. Yes. Well, we passed that buoy and struck the ground with our stern when the ship was turning to the starboard.

Q. Was any order given to your engines with reference to that buoy?

A. Well, we had to stop our starboard engine too.

Q. Why?

A. Because the buoy was so close to our stern, and we would get entangled with the chain then, in our propeller.

Q. And the starboard engine was stopped?

A. Yes.

Q. To avoid that?

A. Yes.

Q. What happened to you with your starboard engine stopped and your starboard tug gone—what happened?

A. Well, we went a little slow ahead all the time, and the ship was turning to the starboard side all the time too, and we struck the ground with our stern, and later on when she turned more over to the starboard she touched the ground with her amidships.

Q. The bow swung to starboard how far?

A. Well, it can't swing very far, she was close over to the other side at Vegesack—on the Vegesack side.

Q. Did the bow fetch up finally on the shore at Vegesack?

A. Yes, very close to.

Q. And when the bow fetched up on the opposite side of the river, where was the rest of the ship?

A. Well then I ordered the two tugs I had alongside, to make fast on her stern and pull her back. We pulled [fol. 96] her back a little and she came just across the Lesum River and was fast to the ground.

Q. So that the ship blocked the entire Lesum?

A. Yes.

Q. And the stern projected out into the channel of the Weser?

A. Yes.

Q. After this second stranding, did you finally get off and get back to Bremen?

A. Yes, we got off.

Q. When the ship was docked the second time in Bremen, what did you find had happened to your rudder blade?

A. Then the ship, after discharging, drydocked her again, and found out that the rudder blade was bent a little, just the lower part.

Q. The bend began about where?

A. To the starboard——.

Q. Began about where?

A. About the middle—start in the middle and——

Q. The lower part of the blade from the middle down was bent somewhat to starboard?

A. Yes.

Q. About how many degrees was that bent?

A. I figured about 5 degrees.

Q. Did you yourself go down onto the dock at that time?

A. Oh yes, I was there all the time.

Q. You went down in the bottom of the dock and aft of the ship?

A. Yes. Well, I looked the ship all over, she was highly damaged in amidships too.

Q. And you saw yourself, from close to, how much the rudder had been bent?

A. Yes.

Q. Please state whether or not, Captain, in your judgment, the "Isis," with her rudder lashed amidships, with her engines in perfect running order and with the three tugs, was fit to tow down the Weser when you started out [fol. 97] on the morning of February 10th.

A. Oh, yes, she was fit to tow down because we had more horsepower on the tugs than we had on the boat, and the ship with the two engines, when we are out in the open sea, we steer her with the two engines without any rudder or anything.

Q. If she was fit to tow, what was wrong?

A. There was nothing wrong.

Q. Well, who is to blame for the accident?

A. Well, the accident—I blame it to the pilot.

Q. What was wrong with him?

A. Well, he ought to know how the conditions of the current are in this river, and I didn't know before there was such a strong current going in from the River Weser to the River Lesum, but he ought to know that.

Q. What mistake was made by him?

A. The mistake was made—he went over too much to the starboard side before we passed the boat—the last boat.

Q. How could he avoid it—what should he have done?

A. Well, he keep the middle or he should stop there and let the other boat pass by.

Q. Stop where?

A. Stop where we were between 16th and 17th.

Q. If, when the other ship was seen, your boat had stopped in the river up at the 16th kilometer, and let the other ship go by, would you then have had any difficulty in getting around the Lesum bend?

A. No, not at all.

Mr. Longley: I am afraid I shall have to object to the question as calling for the witness's speculation.

Q. If your boat had been undamaged, and you had been going down the river under your own engines with no tugs [fol. 98] at all, and your rudder in perfect order, what would have been the proper navigation in that location with reference to the other ship?

Mr. Longley: Objected to on the ground that the witness has testified he is not familiar with the proper navigation of the river.

Mr. Haight: He is now.

A. You see if we pass a boat right here where we did pass the other boat, I know now the current would put the boat over to the bank—to the Lesum bank—and I wouldn't allow it again to pass a boat right there, because that is bad navigation to pass a boat on those banks here, and if he had—if the ship was intact with the rudder—had no tugs—we would just the same strike that bank there.

Q. Would you have been a bit better off the way the pilot navigated your ship, if your rudder had been intact and you had been running under your own steam without tugs?

Mr. Longley: I object to the question as calling for speculation.

A. I think it would be worse. Then we had no tugs at all, and we would run right ashore on the Vegesack side—with good speed maybe too.

Q. Was it any more difficult to pass this ship, because it was done during the night-time?

A. There is no difference. It was a clear night—moonlight.

Q. Could you see the shore of the river as you came down?

A. Oh, yes.

[fol. 99] Q. Was there any difficulty in seeing it?

A. No.

Q. Were all of the lights in the river lighted?

A. Oh yes.

Q. Are there many lights?

A. Oh yes, it is all full of lights up to here.

Q. Did you know where the center of the channel was?

A. Yes.

Q. From the lights?

A. Yes.

Q. Would you have been any better off by daylight?

A. I don't think.

Q. Did you, as a matter of fact, see the buoy down at the Lesum before you reached it?

A. Yes, I saw the buoy.

Q. How long before?

A. Well, a couple of minutes—maybe 300 or 400 meters.

Q. 400 meters would be more than two minutes, wouldn't it?

A. About three minutes, I would say. It is a very small buoy, you can't see it by daylight very far.

Q. But you did see it?

A. Yes, I did.

Q. So with the moonlight and the lights, you knew exactly what was happening to your ship?

A. Yes.

Q. After this second stranding, what became of your pilot?

A. Well, he broke down altogether, he didn't know what he was going to do, I said "Sit down and have a rest", I didn't care for him any more, so I called in another pilot from Bremen——

Mr. Longley: I object to any testimony with relation to what was done in relation to pilots after the stranding, as incompetent, irrelevant and immaterial.

Q. Go ahead.

A. I called another pilot, and the pilot came down and— [fol. 100] well, he couldn't do then any more, he was just waiting for high water again.

Q. Did the second pilot then take charge?

A. The second pilot then took charge.

Q. And took you back?

A. Yes.

Q. Did the first pilot leave the ship?

A. No, he was still on board.

Q. Did he give any orders after that?

A. No, no more. I told the other pilot to take the command and leave this one out.

Q. While you were ashore the second time, what was done to get your ship afloat?

A. Well, we started discharging first——

Q. You discharged some cargo?

A. Yes.

Q. About how much?

A. 135 tons.

Q. You hired lighters to do it?

A. Yes.

Q. You hired tugs to float the ship?

A. Yes, and we hired a lighter too to pump the oil out, but he came too late.

Q. As your vessel rested across the point of land there, dividing the Lesum from the Weser, was there serious risk that she would break in two?

A. Yes, at low water, we had lots of cargo there in amidships, and I saw the deck broke open right in the middle, right across the ship, and the plates were bent up on both sides.

Q. It was necessary to get your ship off as fast as possible?

A. Yes.

Q. How many tugs did you actually employ to pull her off the strand?

A. At last we had 17 tugs.

Q. When was she finally floated?

A. It was just before 7 o'clock, I think.

Q. On the same day?

A. On the same day.

Q. Were these all salvage tugs employed—no cure no pay—a regular salvage basis?

A. Yes.

Q. There was no time to make contracts for day's work?

[fol. 101] A. No, so I had a tugboat company from Unter Weser, and one from another company, that was the heaviest tug, and two tugs from the North German Lloyd.

I ordered the two tugs at last, when I saw they couldn't move her at all.

Q. When you got back to Bremen, the ship was very badly damaged?

A. Yes.

Q. You had to then transship your cargo?

A. Yes, everything.

Q. If you hadn't lightered your cargo and employed all these tugs, was there serious risk that your ship would break in two and everything become a total loss?

A. Maybe the next low water she would have broken more and more, she might have some more breakage on the ship just in the middle where she was lying up on the bank.

Q. Floated as she was that same night, was the cargo all kept free from damage?

A. Yes.

Q. That is, you didn't get any water into your cargo compartments?

A. No.

Q. It is stated in the Seeamt report, that the "Isis" tended to sheer to starboard all the way down the river before this second stranding, is that correct?

A. Before the second stranding?

Q. Yes.

A. Down the river?

Q. Yes.

A. No.

Q. Did you attend the sessions of the Seeamt?

A. Yes.

Q. All of them?

A. Yes.

Q. Were you present when the men called from your ship testified?

A. Yes.

Q. The mates and the engineers?

A. Yes.

Q. Did any of your officers testify that the ship had sheered to starboard as you were going down the river?

Mr. Longley: Objected to as calling for hearsay, incom-
[fol. 102] petent, irrelevant and immaterial.

A. No, I remember it very well, there was nobody saying that.

Mr. Longley: I move to strike out the answer.

Q. Did you yourself ever say so?

Mr. Longley: This all may be subject to the same objection.

Mr. Haight: Certainly.

A. No.

Q. When was it that the "Isis" was sheering to starboard?

A. It was when she came up after the first stranding.

Q. As you went down from Bremen until you got down almost to the Lesum, please state whether or not you had any difficulty in steering your ship, with the tugs and your own engines?

A. No, we had no difficulty at all, because the ship was steering very well down the river up to this position here where we passed the other boat. We have lots of bends here, right here too, where we passed all right, and the ship was going all right all the time.

Q. Were your engines used to help in steering around the bends?

A. Yes.

Q. Either to port or starboard?

A. Yes.

Q. Did they work all right with the tugs?

A. Yes.

Q. Were there times, as you came down the river, that both of your engines were stopped and the tugs handled you alone?

[fol. 103] A. Oh, yes, we had sometimes stopped for 20 minutes, and the tugs was handling the ship all alone.

Q. When the river was straight, or approximately so, the tugs were all right without any propellers, were they?

A. Yes, except here, this bend (indicating from the port down to about the 9th kilometer), they were making the bend to the port side.

Q. And there, what was your general maneuver on your own engines?

A. There we used mostly our starboard engine going ahead, then further up——

Q. Down below here, where you got your swing to starboard, from about the—between the 13th and 14th kilometer down there?

A. There, we mostly used our port engine.

Q. As a matter of fact, does your maneuver book so show?

A. Yes, I think that is true what is in the maneuver book.

Q. How was your wind as you came down that night?

A. The wind was from our port side.

Q. From the way the ship handled as you came down, up to the time that you passed this boat, what is your judgment as to whether or not your rudder was amidships and perfectly straight?

A. Yes.

Q. What is your judgment—was it or was it not so?

A. It was so.

Q. You have towed boats before you have had your ship towed before?

A. Yes.

Q. In Hamburg, is it customary to shift without steam on your engines?

A. In Hamburg I don't use the engines and don't use the rudder at all, we just handle the boat with tugs, and sometimes for one to two miles, from one point to the other, with loaded ships too, and during the night.

Q. From all the experience you have had while you have [fol. 104] been going to sea, was there anything to indicate that there was anything wrong with the steering qualities of your boat, up to the time you reached the Lesum?

A. No, we had more steering power at that time than we would have had without tugs and the rudder intact.

Q. Captain, is that the maneuver book of the "Isis" (handing witness book) showing the movements of both engines on the morning that you left Bremen?

A. Yes.

Q. What time was it that your standby order was rung?

A. 1:33.

Q. When was the first order to the engines actually given to start the ship?

A. 1:50.

Q. Will you refer to the chart of the river and please tell me where your ship was—take a pencil and mark with the letter "X".

(Witness indicates with the letter "X".)

A. Here we pull out backwards.

Q. You pulled out stern first?

A. Yes.

Q. Over towards the big dock marked "Hafen 2"?

A. Yes. We backed a little and made fast to tugs alongside #4, and then we went ahead and passed through here. There is a lighthouse here and a little light there (indicating).

Q. That is, there are two lighthouses?

A. Yes.

Q. One marked "F R"?

A. Yes.

Q. And the other "F G W"?

A. Yes.

Q. And there is a space between those two lighthouses?

A. Yes.

Q. Through which the vessels go from the Hafen No. 2 into the river proper?

A. Yes.

Q. How long were you maneuvering before you got out in the river?

A. We were maneuvering about half an hour—a little [fol. 105] more than half an hour—and we passed this lighthouse here on the side at 2:11.

Q. The maneuvers in your book, from 1:50 to 2:11, as I understand you, were backing out?

A. Yes.

Q. Turning the ship around?

A. No, we didn't turn her.

Q. Well, backing her out and swinging her?

A. Swinging her.

Q. And passing out through between the two lighthouses into the river?

A. Yes.

Q. And at 2:11, you were ready to start down the river?

A. Yes.

Q. Are you able to tell me how long it took you to make the gradual swing to port, after you got into the river until you got down to the 9th kilometer?

A. Yes—the river makes a bend to the port, and it took about 30 minutes to there.

Q. Have you made a careful study of your maneuver book and of your chart, and figured out with reference to your ship's maneuvers, where you were at various times?

A. Yes. At 2:40 we were at the 9th kilometer.

Q. From 2:11 to 2:40 you were making a gradual turn to port?

A. Yes.

Q. Please look at your entries in the maneuver book, between 2:11 and 2:40, and state whether or not the starboard engine was running more than the port engine.

A. Yes, you can see that here the port engine (indicating first column). (Reading from second column) Slow ahead, stop, slow ahead, stop, slow ahead, stop, slow ahead, stop, slow ahead, slow ahead——

Q. Which is your port engine?

A. This is the port engine (indicating in the book).

Q. In the maneuver book there are two columns on each page?

A. Yes.

[fol. 106] Q. Which column is the port engine and which is the starboard engine?

A. The left-hand column is the port engine, the right-hand column is the starboard engine.

Q. Did I understand you correctly then that from 2:24 to 2:40, the port engine was stopped entirely?

A. Yes.

Q. That is while you were making the bend down to the 9th kilometer?

A. Yes, to the port.

Q. Referring to your maneuver book, it shows that between 2:40 and 2:53, various orders were given, and at 2:53 the port engine was stopped.

A. Yes.

Q. At 2:51, the starboard engine was stopped, and both of them were stopped most of the time apparently for about 25 minutes?

A. Yes, the starboard engine was stopped about 20 minutes at that time.

Q. You have already testified that you were making about——

A. 8 kilometers over the ground.

Q. From 2:40 to 2:53, how far in your judgment did your boat travel?

A. 9 to 11—that is 2 kilometers in 13 minutes.

Q. Have you indicated on the chart the position which you think your ship was in, both at 2:40 and 2:53?

A. Yes. That is 13 minutes, made 2 kilometers.

Q. At 2:53, you figure that you were at the 11th kilometer?

A. Yes.

Q. If that is correct, between the 9th and the 11th, you were practically on a straight course?

A. Yes.

Q. Please look at your maneuver book, and state whether or not the orders given to your engines indicate that that was the fact, that the engines from 2:40—the different orders given from 2:40 to 2:53, as they appear on both the [fol. 107] port and starboard engines—do they indicate a straight channel or a bend in the channel?

A. Well, there is a little of a bend right here (indicating).

Q. Near the 9th kilometer?

A. Yes, a little, and then it is a straight line going up to 11.

Q. At 3:16, you started maneuvering again on your port engine?

A. Yes.

Q. Where do you say you were at that time?

A. At 3:16 we were between the 13th and 14th kilometers.

Q. Have you indicated that position also on the chart?

A. Yes.

Q. From the 14th kilometer down until you approach the Lesum, nothing happened?

A. No.

Q. Can you identify in your maneuver book the time when you passed the other ship just before you got to the Lesum?

A. Yes.

Q. What hour was that?

A. It was 3:40.

Q. At 3:40, what order was given on your port engine?

A. Half speed astern, and stopped her again at the same time.

Q. Will you please state what the various abbreviations mean?

A. Stp means stop; VV would be full speed ahead; VL is slow ahead; VH is half speed ahead; RH is half speed astern; RL is slow astern; RV is full speed astern.

Q. What is the German for full speed?

A. Volle Kraft.

Q. Stp means stop?
A. Yes.
Q. What is standby?
A. Achtung.
Q. Hb means port?
A. Yes.
Q. Stb means starboard?
A. Stb means starboard.
Q. With reference again to your maneuver book, are you able to identify the point when your bow fetched up on the other shore and your ship was aground?
[fol. 108] A. Well, just a couple of minutes before, when our bow turned to the starboard.
Q. Look at your maneuver book. Will you tell me when it was, with reference to the book, that you went ashore?
A. That is about 3:40 we struck the bottom with our stern, and then 3:52 the ship was fast on the ground.
Q. The order on your starboard engine is "Stop at 3:51"?
A. Yes.
Q. And your port engine wasn't stopped until 3:53?
A. Yes.
Q. You figured 3:52, your ship was ashore?
A. Yes.
Q. Can you identify the point where you stopped your starboard engine for fear you would get your propeller entangled in the chain of the buoy?
A. That was 3:45 and 3:47.
Q. I don't see the starboard engine stopped at 3:47.
A. No—3:49 is stopped.
Q. Please state whether or not that stop was the order you referred to when you were afraid of tangling your starboard propeller in the chain.
A. Yes, it must be 3:49 we passed the buoy and struck the ground there with the stern—that was 3:49.

Mr. Haight: I will offer the maneuver book in evidence.

(It is marked Respondent's Exhibit 7.)

Mr. Haight: I offer the chart of Vegesack to Bremen in evidence.

(It is marked Respondent's Exhibit 8.)

Mr. Haight: Respondent's Exhibit 8 is a photostatic copy [fol. 109] of official chart No. 4905, Weser River, corrected to April 6, 1929, by the Hydrographic Office of the United States Navy Department.

Q. In the Seeamt report, it is stated that your boat stranded at 4:15—the pilot so reported also.

A. Well, that is what the pilot reported, but that is not right.

Q. You are sure that is not right?

A. I am sure.

Q. In the Seeamt report it is stated that the stranding was caused by the limited steering capacity of the "Isis". What have you to say about that?

A. I didn't understand you.

Q. In the Seeamt report, they say that your ship ran ashore at the Lesum, because you had insufficient steering capacity—that your tugs and your engines didn't have enough steering capacity to navigate the boat.

A. I say we had.

Q. With the three tugs and the steamer's engines, please state how your steering capacity compared with your capacity with no tugs and your rudder in operation.

A. I think I said that before.

Q. Yes, I think you did. I want you to repeat it.

A. I said that our steering capacity was more with the three tugs and our own engines, the rudder amidships, than the ship would have without tugs and the rudder intact.

Q. On the night that you left Bremen, that is between 1:00 and 2:00 A. M., February 10th, when was low water and when was high water?

A. It was 12:30 low water in Bremen.

Q. When you left Bremen, was your time of departure fixed with reference to passing the Lesum?

A. Well, that wouldn't make any difference if I would [fol. 110] leave an hour before or later. That is just we want to start in with flood tide.

Q. What point in the river were you aiming at, if it didn't make any difference about Lesum—what did make difference, if anything?

A. There was another bank further down below Brake—that is what the pilot told me, I didn't know anything about that bank—and he say "We have to tie up in Brake and waiting for flood tide again", 12 miles below Lesum.

Q. Does that chart which I show you, No. 4905—does that contain—give the river from above Vegesack down to Brake?

A. Yes.

Mr. Haight: I offer the chart of the river in evidence.

(It is marked Respondent's Exhibit 9.)

Q. You mean Brake was 12 miles below Lesum?

A. Yes.

Q. When you left Bremen, you were navigating with reference to Brake?

A. Yes.

Q. According to the pilot's statement?

A. Yes.

Q. Did you have any discussion with the pilot as to whether it was better to go by night or by day?

Mr. Longley: I object to the question as calling for hearsay, incompetent, irrelevant and immaterial.

A. No. So the pilot came on board and he didn't know which way we want to handle the ship, steering and so on, so I told him all about it, and he said "Well, it is all right then, we make fast the tugs here and there", and whatever [fol. 111] he told me, and we went out of the dock; and then later on, we have to tie up in Brake.

Q. Perhaps you didn't understand the question, Captain. Did you have any discussion with the pilot as to whether going down at night or going down by daylight would be better?

Mr. Longley: May it be understood that my objection is entered to all this line of examination?

Mr. Haight: Yes.

A. No.

Q. You have already testified about the lights in the river?

A. Yes.

Q. Will you please tell me, from your experience, whether, with the lights on a clear night, with the moon shining, there was any reason for not starting down towing the "Isis", on the 10th of February?

A. No. We had no reason to wait for any other time, because the lights and everything showed us very good where we were to maneuver the ship.

Q. How much moonlight was there—do you know what phase the moon was in?

A. I think it was full moon, I don't know exactly.

Q. Was it clear weather all the way down to the Lesum?

A. Yes, all clear.

Q. From the time your boat started her engines at 1:50, up to the time that she went ashore, who was it that gave the orders as to the maneuvers made?

A. Why, the pilot was giving the orders, and I repeated the orders to the tugboats by megaphone.

Q. After you had passed the steamer down near the Lesum, did you give any orders to the tugs as to their [fol. 112] maneuvers, to bring you back into the channel?

A. Yes. I went to the starboard side on the bridge and shouted over to the tug on the starboard quarter to give her full speed ahead and then I run over to the other side and shouted down to the tug on the port side to give a full speed astern, and at the same time I think the pilot gives our engines just the same—port full astern and starboard full ahead.

Q. When you went and gave the orders through the megaphone to the starboard and port tugs, please state whether you were repeating the pilot's orders or were giving orders of your own?

A. No—I was repeating the pilot's orders.

Q. I examined your maneuver book, Captain, with some care, and I can't find in it that before 3:52 your starboard engine was ever put full speed ahead. At 3:50 on the port engine there is the order full speed astern, and on the starboard engine slow ahead, but the starboard engine never seems to have been put full speed ahead.

A. Well, you see the ship had a little headway at that time, so we couldn't give her full speed, because the ship would have more headway and run too quick over to the side.

Q. I understood you to say that when you gave the tug the order full speed ahead, you thought the pilot gave the same order to his engines?

A. Yes.

Q. You were then off on the end of the bridge?

A. Yes.

Q. Please look at the stowage plan which I hand you. Is that the stowage plan of the "Isis" as you entered the Weser in February 1928?

A. Yes.

Q. And what did the different colors mean?

[fol. 113] A. Cargo for Bremen is red, blue for Hamburg, yellow for Antwerp.

Q. That is, each lot of cargo has been surrounded by the color showing the port for which it was intended?

A. Yes.

Mr. Haight: I offer the cargo plan in evidence.

(It is marked Respondent's Exhibit 10.)

Q. I forgot to ask you with reference to the blueprint (Respondent's Exhibit 6). Does that show at the stern the water line when your vessel was down to her marks?

A. Yes, about here (indicating).

Q. Are the lines that run off from the stern intended to indicate the water line at full draft?

A. Yes.

Q. What is the draft of your ship aft when you have her on her mean full draft?

A. 24 feet 5⅛ inches.

Q. What was your draft when you left Bremen early in the morning of February 10th?

A. That was 18 feet 6 inches forward, and 23 feet 3 inches aft.

Q. Considerable testimony was taken in Hamburg while you were away, with reference to the condition of the lashings on your rudder when you got back to Bremen after the second stranding. Will you please tell me whether or not the lashings on the rudder were slacked up while you were working on your ship trying to release her from the strand at the Lesum?

A. Yes.

Q. Why were they slack?

A. The chief officer came on the bridge and asked me where we wanted to make fast all the tugs, and I said to [fol. 114] the bitts we have aft, so we have got the lashings up there, and there is not much to make fast, and I

said "You stay on the bridge and I will go back and look it over", so I came aft and I saw these lashings were fast on the bitts, here and here (indicating), and even on the other side——

Mr. Haight: The witness indicates the two bitts at the points "A".

A. (Continuing:) so I told the boatswain to let go the lashings and put them on the rail, here (indicating) so we could make fast the tow ropes, and he did it.

Q. Did you touch the screws in the quadrant?

A. No, not at all.

Q. Did you subsequently make these lashings fast again?

A. Yes, I did.

Q. When did you do that?

A. When the ship arrived in port and we let go the tow ropes and everything, so I told the boatswain to tighten up the lashings again, how they was before.

Q. That was long before any of the surveyors or anybody else saw your ship?

A. Yes, nobody knows anything about that.

Recess taken to 2 P. M.

After recess, 2 P. M.

Present: As before.

Paul Knudsen resumes the stand.

Cross-examination.

By Mr. Longley:

Q. Captain, I take it that you will agree with me that the rudder is a very important part of the machinery of a vessel?

A. Yes.

[fol. 115] Q. This was your first trip up the Weser River to Bremen as a master, was it not?

A. No, that was the second.

Q. And your third trip in any capacity, is that not so?

A. No, I was—with this time, I was up four times altogether.

Q. Three times prior to this?

A. Two times for mate and two times for master.

Q. But for the reason of your lack of familiarity with the river, I take it in going up, you put yourself under the directions of the pilot even more so than you would under ordinary circumstances in waters with which you are familiar, is that not correct?

A. Yes, sir.

Q. Who was it that directed that the ship be anchored going up?

A. When we anchored?

Q. Yes.

A. On the first time?.

Q. Yes, going up to Bremen.

A. Well, it was the pilot.

Q. And that was because thick fog appeared?

A. Yes.

Q. In your direct examination, I understood you to say something about that while you were at anchor your engines were used. Did I misunderstand you?

A. That is right—I used the engines just before high water, and the tide was going up, so I didn't want to let the ship swing around, I kept her straight in the channel.

Q. In your logbook appears the language, "The engines were kept ready for quick usage continuously". That rather suggests that you were not using them. Can you explain this entry?

A. Well, I told the chief engineer to stand by the engines all the time. We were keeping sea watches all the time at anchor.

Q. You told him to stand by to be ready?

A. Yes.

[fol. 116] Q. What are we to understand from that—that you were not using your engines or that you were using them?

A. We were using them.

Q. Then when the fog lifted, you for the first time found that you were aground?

A. No, the fog wasn't lifted.

Q. Well, I may be in error on that. When did you discover that you were aground?

A. Well, we took soundings.

Q. How did it happen you took soundings?

A. Well, that is what we usually do on the river when we are at anchor?

Q. There was no reason to suspect you were aground?

A. No.

Q. But you just took soundings as a matter of precaution?

A. Yes, sir.

Q. When was it that you ascertained you were aground?

A. Well, it was I can't say exactly—about half of the tide—when the tide was running down.

Q. In your logbook it appears that at 7:00 A. M. it was beginning to clear and it was found that the anchor was lying in the channel and the ship was forced against the westerly river bank—is that a fair statement of the situation?

A. Yes.

Q. Then you naturally began to make efforts to get your ship off, did you not?

A. Oh, yes. I thought she was afloat, and later on I took the soundings and I saw the ship was on the ground, so we tried it with the engines but we couldn't do anything.

Q. And then you had the tugboats come up, as you have explained?

A. Yes.

Q. And eventually, before high water, the ship came off the bank quite suddenly, did it not?

A. Yes.

[fol. 117] Q. It was a sudden movement when she came off, is that not so?

A. When she came off it was long before high water.

Q. But I mean it was a sudden movement—quick?

A. Oh, yes.

Q. It surprised you, in other words—that is so?

A. Yes.

Q. As a result of the surprise in having her come off when she did, you were not prepared to hold her, is that not correct?

A. Yes, that is right, but we couldn't hold her. The wind sets in from the——

Q. I am not going into why you couldn't but my statement is true?

A. Yes. Everything was prepared to use the engines just whenever we need the engines.

Q. According to your logbook it was 12:47 that the ship—as it appears in the logbook—"slid suddenly into the deeper water, so that it became free from the bank." That is a correct statement of the situation?

A. Yes.

Q. And then when she slid clear of the bank, she turned with terrific force, did she not, by virtue of the current and the wind?

A. Yes.

Q. And as a result of that sudden turn, the ship hit her stern against the bank?

A. Yes.

Q. Which bank were you aground on, looking up the river—on the starboard bank?

A. On the port bank.

Q. You were aground on the port bank?

A. Yes.

Q. And you hit on the port bank?

A. No, we were aground on the starboard bank and hit on the port bank.

Q. How wide is the channel there?

A. At low water it is about 90 meters.

[fol. 118] Q. So that when you came off from the starboard bank, your stern swung around across the river?

A. Yes.

Q. And hit with terrific force against the port bank?

A. Yes.

Q. And that hitting of the stern of your ship—you, of course, know, naturally, meant that the rudder had hit against the port bank, did you not?

A. Yes.

Q. That is a part of the ship which is exposed at the stern and will hit against a bank?

A. Yes.

Q. When, thereafter, you started up the river with the tugs, it was not a great surprise to you, was it, that you found difficulty with your steering apparatus?

A. Well, I didn't think the rudder was damaged, because I couldn't see it.

Q. Well, anyway, you did know, as you went up the river, that there was something wrong with the steering gear?

A. Yes, the first time I thought there was something wrong with the steering engine, but we found out it was everything intact.

Q. You examined the steering engine?

A. Yes.

Q. Where is the steering engine—on the poop?

A. Yes.

Q. In a little house there, I suppose?

A. Yes.

Q. Was there any way you could examine the rudder stock?

A. No.

Q. After you had discharged the Bremen cargo, when you first arrived in Bremen, I understand you sent a diver down?

A. Yes.

Q. What was the purpose of sending the diver down?

A. Well, to see what is happened with the rudder.

Q. And I think you told us that he went down some three times?

A. Four times.

[fol. 119] Q. And he at each time reported there was nothing wrong with the rudder?

A. Yes.

Q. What conclusion did you come to under those circumstances?

A. I don't understand that.

Q. I will rephrase it. What did you think was the difficulty then, in view of his report?

A. Well, there was nothing to see on the rudder engine, and we couldn't—the only thing was we could turn the wheel over to the port side and back to the amidships, and nothing to the starboard.

Q. Well, did you then come to the conclusion that your rudder stock was bent?

A. Yes, I thought it must be bent or broken.

Q. And then the ship was put in drydock?

A. Yes—well, after the diver went down and he said he couldn't see anything, there was everything straight and in good condition.

Q. Didn't you plan to put her in drydock anyway, Captain?

A. No, Captain Reichenbacher, from our company, he said, "Well, to be safe, it is better to put the ship in drydock and see what has happened", and then when the ship was in drydock we found out——

Q. Who was Captain Reichenbacher?

A. We call him Director, he was captain before.

Q. He was from Hamburg, was he not?

A. Yes, from the Hamburg-American Line.

Q. He came from the Home Office in the City of Hamburg?

A. Yes.

Q. And he was Marine Superintendent, wasn't he?

A. No, he was Nautical Director.

Q. And he was there when the ship was put in drydock?

A. Yes.

Q. She was put in drydock on the 9th of February, was she not?

A. Yes.

Q. What time of day was she put in drydock?

A. In the afternoon.

[fol. 120] Q. If you want to examine your logbook to refresh your recollection on any of these things, I would be glad to have you do so.

A. (Referring to log.) Well, 4:10 we arrived at the dock.

Q. 4:10 in the afternoon of February 9th?

A. Yes.

Q. And then you were maneuvered into the dock?

A. Yes.

Q. When was it that the gates were closed—what kind of a dock was this—a graving dock?

A. Floating dock

Q. What time was it that they first started raising the ship?

A. Well, 4:10 we was in the dock. At that time they raised the ship—4:10.

Q. As I understand your testimony, Captain, there was water left in the dock to a point some 2 to 3 feet above the bottom of the rudder?

A. 2 feet.

Q. About 2 feet?

A. Yes.

Q. What was the purpose of leaving that water in?

A. The ship had 5,000 tons of freight in, and they didn't want to pump the dock right dry, so they thought it would damage the ship.

Q. It was a question of precaution in relation to damage to the hull of the ship, that the water was left in?

A. Yes.

Q. I would like to have you examine this plan, Captain, which has been offered in evidence as Respondent's Exhibit 6. As I understand it, your water line—load line—is at the point as shown by the suggestion of water to the left of the stern?

A. Yes.

Q. And as a matter of fact, your draft on that day was within a few inches of that, was it not?

A. Yes.

Q. Would you mark here on this plan, with your pencil, [fol. 121] the lowest point which you say to which the water was reduced—mark on the rudder.

(Witness does as requested.)

Q. And that is, it was reduced to about the point of this second pintle from the bottom?

A. Second arm.

Q. And the pintle is right in here (indicating)?

A. Yes.

Q. To reduce the water to that point, of course, subjected your vessel to a great deal of strain, did it not, Captain?

A. Well, the weight of the freight is mostly on the bottom, and for that reason he said it is better to leave some water in and we don't need all the water out.

Q. I understand why you did it that way, but my question was, do you not agree with me that by virtue of leaving such a small amount of water in the dock, your vessel was subjected to great danger of being strained—isn't that so?

A. Well, if they would leave the ship in there for a couple of days like that, that wouldn't be so very good for the ship.

Q. Well, in any event, your testimony is, from the way you have marked this plan (Respondent's Exhibit 6), that at the lowest point to which the water was reduced, about three-quarters of the rudder was above water and about one-quarter below water—is that about correct?

A. Yes.

Q. At what time was it that the water was reduced to this point?

A. It was between 5 and 6—I don't know the exact time—between 5 and 6.

Q. The City of Bremen is about 53 degrees north latitude, is it not?

A. Yes.

Q. Now, on a February day—that is on February 9th—the latitude of 53 degrees, you will agree with me, will you [fol. 122] not, that it is pretty dark between 5 and 6?

A. Well, it starts to be dark at that time.

Q. It more than starts to be dark—it is dark, isn't it, Captain?

A. No.

Q. By the way, Captain, you have been in New York in the month of February, have you not?

A. No, I have never been here.

Q. You have never been here before?

A. No.

Q. Well, I take it you are enough of an astronomer to agree with me that on any particular day in the month of February, it gets darker earlier in Bremen than it does in New York, isn't that so?

A. Yes.

Q. Let's assume that New York is 41 degrees north—it is about that—12 degrees makes quite a little difference in the light between two particular cities, isn't that so?

A. Well, it is about three-quarters of an hour.

Q. So whatever the light may be in the City of New York at a certain time, you get that same intensity of light in Bremen about three-quarters of an hour earlier, that is so, is it not?

A. Yes.

Q. And because of this failure of light, as I understand it, was why a searchlight was employed to examine the rudder?

A. Well, I say when the ship was afloat, floated up to about 2 feet or about one-quarter of the rudder from below, it was nearly dark then, so they used that searchlight after that.

Q. I think you told us on your direct examination, that you went on a little bridge that was across the dock there behind the ship?

A. Yes.

Q. You stayed there, as I understood your testimony, only up to the point where the water was reduced to about halfway the rudder?

A. Yes.

Q. Subsequently, you didn't go astern of the ship, I take [fol. 123] it from your testimony?

A. No, from that bridge I saw.

Q. I say, subsequent to that time, the time the water was reduced to halfway down the rudder, you did not go again aft of the ship?

A. Yes.

Q. You were then standing on the side of the dock and afterwards went on the bridge of the ship?

A. Yes.

Q. The other men who examined the rudder, I think you told us were in a small boat?

A. Yes.

Q. Which they propelled across the water in the dark, up to the rudder?

A. Yes.

Q. And their examination of the rudder was made entirely from this boat?

A. Yes.

Q. In February, in Bremen, it is pretty cold, isn't it, Captain?

A. Oh, yes, it is.

Q. The water is pretty cold too?

A. Yes.

Q. Their examination of the rudder, as I understand from your testimony, was in putting their arms down into this water in the dark and feeling of the lower end of the rudder, isn't that so?

A. Yes.

Q. And also, I think you told us, they used sticks?

A. Yes.

Q. Just what did you mean by the use of sticks?

A. They had sticks and feeled down on the rudder blade.

Q. What was the purpose of that?

A. To see if there was anything happened—they thought the rudder was bent below or so.

Q. How could they tell it with the stick?

A. Well, you can feel something with the stick.

Q. What would you expect them to feel?

A. Well, they just feel down if the rudder was straight, or the blade.

Q. I understand your words, Captain, but what I am trying to get you to do is to explain to me how they would [fol. 124] tell whether or not the bottom part of the rudder was straight or bent by pushing a stick through the water?

A. I think you can feel that with a stick just the same. I never tried that, I myself never tried it.

Q. You are not in a position to tell us how they would reach the result, but at least the purpose, as you understood it, of poking the sticks down through the water, was to see if the bottom part of the rudder was straight or bent?

A. Yes.

Q. And there were how many men conducting this operation?

A. There was Captain Reichenbacher——

Q. Who was he—the man you referred to as your superior?

A. Yes—and Captain Wuhrman from the dock——

Q. Some ship repair yard, you mean?

A. Yes—and Mr. Schubert.

Q. Who was he?

A. He is an inspector. He is from the shipbuilding office.

Q. He was a Hamburg American man, was he?

A. Yes.

Q. An inspector?

A. Yes.

Q. And who was the fourth man?

A. The chief engineer of the shipyard there—Menck.

Q. The conclusion which you reached in collaboration, perhaps, with the other men, as I understand it, was that the rudder stock had become twisted?

A. Yes.

Q. And you reached that conclusion by your experiment in putting your wheel amidships, and finding your blade was to starboard, is that right?

A. Yes.

Q. How heavy is this rudder stock?

A. I can't tell.

Q. Well, how many inches in diameter?

[fol. 125] A. I know it is 250 millimeters—the diameter—250 or 225—I don't know exactly.

Q. It is between 225 and 250 millimeters?

A. Yes.

Q. And it is made of steel?

A. Yes.

Q. You agree with me, do you not, Captain, that for a rudder stock of the dimensions to which you have referred, to become twisted, must have required that the rudder itself receive a very severe blow—is that not correct?

A. The rudder itself?

Q. The blade of the rudder.

A. I can't understand that.

Q. I will rephrase that. For the rudder stock to have become twisted, as you determined it had become, it must be that the blade of the rudder had received a very severe shock—does that not necessarily follow?

A. A severe shock—what is that?

Q. A severe impact.

Mr. Haight: Pressure.

The Witness: Oh, yes.

Q. I don't like "pressure" so much—a blow?

A. Yes.

Q. In other words, the only way the stock could become injured, would be through the blade of the rudder hitting against something, and hitting a very severe blow—that is true, is it not?

A. Yes.

Q. You yourself made no examination of the rudder, except as you looked at it from this small bridge at the time that the water was reduced halfway down?

A. Yes.

Q. The answer is no, isn't it—you did not make any other examination?

[fol. 126] A. No, not any other. I just looked from the bridge, and afterwards from the dock. I didn't go down.

Q. As a matter of fact, after the ship returned from the second stranding, and was in drydock, you ascertained, did you not, that the bend in the rudder then discovered, started at about halfway down the rudder?

A. Yes.

Q. So that so far as you yourself are concerned, the bend which was discovered after the second stranding, you could not have seen at any time because you didn't examine it—isn't that so?

A. No. When I was standing on the bridge from halfway the bend starts from halfway down so if it was before I could see it.

Q. How could you see it, Captain, when the lower half was under water?

A. Well, later on I was standing on the side of the dock, then the bend was going from here (indicating middle arm) down, and when I was standing on that bridge I could see it up to here (indicating).

Q. You could see it down to the middle arm?

A. Yes, and then later on, when they pumped it out, I was standing on the side and could see the rest of the blade down to here (indicating).

Q. Then afterwards, you stood on the side, you say, and you stood there until the pumping ceased?

A. Yes.

Q. And then one-quarter more of the side of the rudder was presented to your eye?

A. Yes.

Q. But it was only the side that was presented to your eye, as you stood on the side of the dock?

A. Yes.

Q. My recollection is that you testified that after the second stranding it was ascertained that the bend in the rudder, discovered, was only of about 5 degrees?

A. Yes.

[fol. 127] Q. That 5 degrees was at the lower end—the very bottom of the rudder, was it not?

A. Yes.

Q. And it tapered off to nothing at about the middle of the rudder—about halfway up, I mean?

A. Yes.

Q. If you had known that the rudder had the bend, at the time you left Bremen, which was later discovered at the time it was in drydock after the second stranding, I take it that you will agree with me that you would not have sailed?

A. No.

Q. The reason why you did sail from Bremen with your rudder lashed and with the use of your tugs and your ship's engines, was based on the belief that the blade of the rudder was straight and in no way bent?

A. Yes.

Q. Coming up from the place of the first stranding to Bremen, the tendency of the ship at all times was to go to starboard?

A. Yes.

Q. As I understand your answers to Mr. Haight's questions, prior to arrival at kilometer 17, there was no difficulty whatever with the steering gear—after sailing from Bremen going down the river?

A. We had no difficulty with steering the ship up to that point.

Q. Am I also to understand that it is your testimony that the ship showed no tendency whatever to go to starboard?

A. No.

Q. I would like to examine you a little bit at length on that. Will you open your manœuver book, which is in evidence here as Respondent's Exhibit 7. You agree with me, do you not, Captain, that between Bremen and kilometer 13, the channel of the river presents no material change of course? There are only slight bends?

A. There is one here—a slight bend to port (indicating).

[fol. 128] Mr. Haight: That is from kilometer 6 to 9.

Q. The slight bend to port, to which you refer, is that which ends at kilometer 9?

A. Yes.

Q. But that is a very slight bend to port, is it not?

A. Yes.

Q. And then there is a very slight bend to starboard?

A. Yes.

Q. Now, let's look at your engine movements during that period, Captain. I haven't looked at them yet, but we will look at them together. As you are swinging to port, in this first stretch up to kilometer 9, the natural movements of your engines would be for your port engine to go astern and your starboard engine ahead, is that not so?

A. Yes, but that is not always. You see the tugs handling the ship, and here we can steer only by degrees—1, 2, so forth—to move the engine already——

Q. So that isn't a test of anything one way or the other, because of the use of tugs and the fact it is a slight turn—is that the situation?

A. Yes.

Q. That also applies, I take it, to the next stretch up to kilometer 13? There the turn is so slight that the engine movements do not help us one way or the other as to showing what the tendency of the ship was—is that not so?

A. Yes.

Q. As a matter of fact, there is no turn in the river to port of any great degree until you get to Vegesack?

A. Yes.

Q. So that the ship was then presented, for the first time, with the necessity of making a sharp turn in her course to port—that is so, is it not?

A. Yes.

Q. And it was at that point, when you first had this neces- [fol. 129] sity presented to you, as I understand it, that you had difficulty in steering your ship?

A. Up here, you mean (indicating)?

Q. Yes, up there.

A. That was just when the other boat passed us.

Q. I understand that, but my question correctly sets out the situation?

A. And we went over to this side—to the starboard side—and the tide was coming up here (indicating)—go head on our port bow——

Q. That isn't quite responsive to my question. I think you have gone into that quite fully with Mr. Haight. I don't want to cut you off if you think any of my questions require a longer answer, but I don't want to go into that right now. Now, I want to go into that a little bit, Captain, perhaps just what you were about to touch on. As you got to kilometer 17, as I recall your testimony on direct, you looked across the bend here and saw a steamer coming up the river?

A. Before that.

Q. Where was it?

A. Here, about (indicating).

Q. Between 16 and 17?

A. Below 16.

Q. You could then see this steamer coming up the river?

A. Yes.

Q. And I think you told us it was a large steamer about the size of the "Isis"?

A. Yes.

Q. Now, prior to that time, you have told us you went by a tugboat, I think you said, and some other ships. Where were they?

A. The tugboat was about here (indicating).

Q. About kilometer 12?

A. Yes.

Q. Which side of the river was she?

A. On her starboard side—on our port side.

Q. But you didn't find it necessary to turn out for her?

A. No she went right over to the other side.

[fol. 130] Q. What were those other ships you passed?

A. Dredges.

Q. On which side of the river were they?

A. On our port side too.

Q. And there, again, you found no necessity for changing your course at all?

A. No, they were close on the beach, you know.

Q. Then when you got down here to 16, you saw this large ship coming up. What did you do at 16 with relation to changing your course—anything?

A. I spoke to the pilot, I says, "There is a steamer coming up", he said "Yes, I see her", and I said "What are we going to do, we are just in the center of the channel", and he said "Well, I think we will change our course to our starboard."

Q. That seemed like a reasonable thing to do, didn't it?

A. Well, that is—he shouldn't pass a boat—they should not pass a boat here on that corner.

Q. You were in command of this ship, weren't you?

A. Well, the pilot had the command, I don't know the river, I don't know the conditions of the tide there.

Q. Do I understand you to say that the pilot had command of your ship?

A. Yes, of course—for what for I have a pilot?

Q. Since when have pilots taken over command from masters?

A. The pilot takes command up and down the river. If the pilot said we want to change a course, I can't say no.

Q. You can't?

A. Yes, I can, but what is it going to be?

Q. Let's understand the position of your mind at that time, Captain. Are we to understand that you gave over your ship entirely to this pilot, and considered that you [fol. 131] didn't have command of your ship at all?

A. I agree with the pilot all the time, and I have to do that.

Q. Now, we have got to the thing—you thought at the time it was a reasonable thing to do, to change your course to starboard?

A. You see, I know it is a very narrow channel here, and if you pass a boat, the boat is going very close by, so we had a tugboat alongside on our port side, I thought they would cut off the tugboat if he don't move a little over to the starboard.

Q. Then you agreed with the pilot that it was a natural and reasonable thing to do to change your course to starboard?

A. Yes.

Q. You knew that the pilot is dead, do you not?

A. Yes, I know.

Q. When was it that you started turning to starboard—immediately after leaving this kilometer 16—as soon as you saw her?

A. Yes.

Q. Will you mark on this chart (Respondent's Exhibit 8) exactly where the "Isis" stranded?

A. Right here (indicating with the letter "Z").

Q. The mark in red across the mouth of the Lesum River is where the vessel eventually fetched up, is that so—fetched up means stranded?

A. Yes.

Q. Well, at the time you first saw this ship coming up the river, you were apparently about a mile or nine-tenths of a mile above the point of eventual stranding—that is so, isn't it?

A. Yes.

Q. And at that time you started changing your course to starboard?

A. Yes.

Q. Well, what happened—what orders did you give or what orders were given in order to effect this change of course?

A. You mean to the engines?

[fol. 132] Q. To anyone.

A. Well, the tugboats were going ahead all the time at that time, we just worked with the engines, with our own engines.

Q. Perhaps you can tell us when it was that you got to kilometer 16. Can you tell us that?

A. About 3:30 or 3:33, something like that.

Q. These figures that you have marked on this chart (Respondent's Exhibit 8) of 3:16 here and 3:40 there—how were those computed when you filled them in? How did you reach the conclusion that the vessel was there at 3:16?

A. Well, I know exactly the time when we left here (indicating).

Q. Left the dock at Bremen, you mean?

A. Yes, and I know the time when we passed here (indicating kilometer 9).

Q. How do you know that—you marked it in your logbook, you mean?

A. No.

Q. How did you know when you got there?

A. We call that Industry Harbor—here is a gate going through here.

Q. How do you know when you got there? I see you have marked there "2:40". Where do you get that time from?

A. Well, I know this time exactly—2:11.

Q. How do you know that exactly, is that in your logbook?

A. No, that is when we passed here (indicating).

Q. Well, how do you know that then?

A. How?

Q. Yes—how do you happen to recollect you started from that point at 2:11?

A. That is where we usually put it, we have to put it in the logbook, but we didn't do it this time.

Q. You usually don't put 2:11 in the logbook. I am asking you how you know now that you started from there at 2:11 if it isn't in your logbook?

[fol. 133] A. Here standby and there all the maneuvers, when we were going back, and here is where we were backing our port engine to give the ship a turn to port (indicating 2:10).

Q. Then to shorten this up——

A. (Continuing.) and 2:11 slow ahead, she had turned and was going slow ahead.

Q. Then it was in reference to your maneuver book that you came to the conclusion it was 2:11 when you started from this point marked 2:11 on the chart. Well, we will start with that then, Captain. Now, what I am trying to get at is how you reached the conclusion that you reached this entrance to the Industrial Harbor at 2:40 and at these other points at the times you have marked on the chart (Respondent's Exhibit 8)?

A. You see, we used our starboard engine all the time to make this bend in the channel (indicating up to kilometer 9), and the port engine was stopped all the time at that time, that is up to here (indicating 2:40).

Q. So that you just guessed, is what it amounts to, isn't it, Captain, that you reached here at 2:40, because at that time you first have a movement in your book on your port engine?

A. Yes.

Q. So during all that time, between 2:24 and 2:40, your port engine was stopped?

A. Yes.

Q. And your starboard engine was making the movements that appear in your maneuver book?

A. Yes—slow ahead, slow ahead, stop, slow ahead, stop.

Q. Is it also true that you reached the conclusion, in relation to the other times appearing on this chart (Respondent's Exhibit 8) by guessing at them after an examination of your maneuver book?

A. Yes.

[fol. 134] Q. And it is true, is it not, Captain, that under this situation presented here, the times you have given here are necessarily but guesses, is that not so?

A. I see in the maneuver book we used both engines at that time, from 2:40 to 2:53—both engines.

Q. That is, the only reason that your came to the conclusion that you were at any particular point on this chart (Respondent's Exhibit 8) at any particular time, is by ex-

amining your maneuver book and finding out what engines were being employed—is that not so?

A. Not only that—all the way down to a certain point we made 16 kilometers from 2:11 to about 3:33.

Q. Well, how do you know you got to 16 kilometers at 3:33?

A. I know we had 3:40 when we passed the steamer.

Q. How do you know that—is that in your logbook?

A. (Referring to log.) No.

Q. Well, it comes down to this, does it not, Captain, you feel reasonably sure that you left this point off the docks at Bremen at 2:11?

A. Yes.

Q. And you have no way of knowing any other time that you arrived anywhere, except the time of stranding, so far as your logbook is concerned—you have entered in your logbook the time you stranded, have you not?

A. Yes.

Q. What time is that?

A. 3:52.

Q. Prior to the entry in your logbook at 3:52, you have no entry of any kind showing the times when you arrived at any particular point or showing the courses pursued—that is true, is it not?

A. Yes, that is only what I can say is, the maneuver book and the distance we made at that time.

Q. That is the distance in mileage between these two [fol. 135] points and the time between 2:11 and 3:52—that is all you have to go by, isn't it?

A. Well, that is 3:52, that is the time we were stranded.

Q. And you left here at 2:11?

A. Yes.

Q. And as one can ascertain the mileage in between, that gives you the average speed over the ground of your ship, does it not?

A. You see from kilometer 17 where we passed the boat, there we had another 13 minutes to come up here to the stranding place, and that is just half a kilometer.

Q. I think I won't go into that any more, Captain. The time of 3:52 entered in your logbook is the time when you hit right here at the point which you have marked with red crayon?

A. Yes.

Q. Will you show me in your logbook any reference there of any kind to any prior hitting of the bank, prior to that stranding across the Lesum River?

A. I couldn't understand that question.

Mr. Haight: Is there any entry in your logbook about striking the bottom before you fetched up at 3:52?

The Witness (examining log): No, it isn't.

Q. From your direct examination, Captain, my impression is that you told us that your speed was about 8 kilos?

A. 8 kilometers.

Q. 8 kilometers an hour?

A. Over the ground.

Q. And how much through the water—I think you said 8 kilometers through the water and 11 over the ground?

A. No—8 kilometers over the ground and about 11 or 11½ through the water.

Q. What was making that difference?

A. The tide—the flood tide.

[fol. 136] Q. The tide was coming in?

A. Yes.

Q. Where was it that you had this occurrence to which you referred—where you feared that your propeller would foul the chain of a buoy?

A. It was right here on this corner. There is a little buoy, but it is not on this map. It was laying in front of the bank. Here is the lighthouse, this big black spot is the lighthouse.

Q. It is within the cover of the black spot appearing at the extreme lower end of the red line you have drawn?

A. Yes.

Q. That was immediately before stranding then?

A. Yes.

Q. Where was it on this chart (Respondent's Exhibit 8) that you say the occurrence was where your ship hit aft?

A. Before we passed this buoy here with our stern, the time when we swung around, we hit the bottom there.

Q. You told us, did you not, that the tide was hitting where?

A. On the port side—port bow.

Q. Perhaps you would explain to us, Captain, how the tide hitting you on the port bow would send your stern against the bank—of course you mean, do you not, the starboard bank?

A. Yes. You see, assume this is the head of the ship—turns around, and the stern going off—but at the time we passed the buoy, the buoy was a little aft of our stern.

Q. Was there a wind, too, by the way?

A. Yes.

Q. Where was that hitting your ship?

A. From the port side.

Q. It was hitting you the same way the tide was affecting you then?

A. Yes.

Q. You agree with me, do you not, Captain, that if you have wind and tide hitting your port bow, your port bow naturally will swing to starboard?

A. Yes.

[fol. 137] Q. I don't quite understand, Captain, and I would be glad if you would explain it to us, how a ship with the bow swinging to starboard can also have her stern swing to starboard and hit the starboard bank.

A. Perhaps the bow was always first, because here was the wind made more effect on the bow than on the stern—the bow was high up, she was 5 feet down by the stern.

Q. So her bow was effected first?

A. Yes.

Q. And her bow turned to starboard?

A. To starboard.

Q. Then her stern turned to port, didn't it?

A. The stern turned a little to port.

Q. Well, how did she hit against the starboard bank then, Captain?

A. Well, on this buoy is not much water. There is where the stern hit the ground—that isn't real bank here on this buoy, the bank is a little further in, but there is not much water, and the ship was 31½ feet deep, and we didn't think—there wasn't water enough——

Q. How long prior to the time this ship went aground at her bow do you say it was that she hit astern?

A. Another 2 or 3 minutes.

Q. As long as that, Captain?

A. Well, I don't think it would—yes—from 2 to 3 minutes.

Q. How did you know, Captain, that you were hitting astern?

A. Well, I feel that—you could feel it if you hit, hit our stern or amidships.

Q. You could feel it hit the stern?

A. Yes.

Q. I thought you told us she didn't hit but once, that is true, isn't it?

A. No, she hit twice with the stern.

Q. How do you explain that, that she happened to hit twice astern, when your bow was still being carried to starboard all the time?

A. She hit the stern and swung a little over and came back and hit again.

[fol. 138] Q. Although all this time the wind and the current were hitting your bow forward on the port side?

A. Yes. And more than that, because——

Q. Because you were out of water forward?

A. No, because the current is going in that place to the Lesum and stronger than the River Weser.

Q. After the ship was firm aground, you took soundings, did you not?

A. Yes.

Q. And those soundings are set out in your logbook?

A. Yes.

Q. They show, do they not, that the ship was fully afloat aft?

A. Yes.

Q. As a matter of fact, you were only aground about the forward third of your ship, isn't that so?

A. No.

Q. How far aft was it?

A. She was from forward up to No. 4 hatch.

Q. What is that—halfway?

A. No, that is on the after end. I will show it on this map (Respondent's Exhibit 6).

Q. How many hatches did she have?

A. No. 4 hatch is here (indicating), and she was on the bottom about to here, on the ground.

Q. You mean at low tide, don't you?

A. Low tide, yes.

Q. It wasn't that way when you first hit?

A. No.

Q. But at no time——

A. But there was another bank here after we were laying aground (indicating about amidships).

Q. That caused the cracking to which you referred?

A. Yes.

Q. It is true that at no time was this ship aground aft after she was stranded down there?

A. After she stranded, the tugs pulled her a little down into the river, so I thought they were getting her afloat [fol. 139] again, and when we passed the buoy on our stern, when they pulled back just a little—about—on the after end of No. 4 hatch—we had the buoy then on the after end of No. 4 hatch—she stopped again, and that is the reason we had her afloat aft, and all the other end was on the ground.

Q. Whatever the reason is, my statement is true, is it not, that the ship was always afloat aft?

Mr. Haight: He just said he hit twice. You mean after stranding?

Mr. Longley: After stranding is what I was referring to.

Mr. Haight: After your ship fetched up with the bow across the Lesum and stopped, did you always have enough water under the stern to float the stern of the ship?

The Witness: No. I say when we passed the buoy there with our stern, the stern hit the bottom twice—the ground.

Q. You have told us about that. Subsequent to those two occasions to which you have referred—after you stranded, your after end at the rudder was always afloat, was it not?

A. Well, the soundings—the river man took the soundings there, he said it was afloat, but I don't think it was afloat.

Q. Then you don't know, the answer is, is it not?

A. It may be just on the rudder.

Q. Did you take soundings?

A. Yes.

Q. Aft?

A. I think I have them here (referring to log). Yes, we have them all in meters.

Q. What were your soundings aft?

Mr. Haight: Taken when?

[fol. 140] The Witness: On the 10th.

Mr. Haight: At what hour?

The Witness: After the ship was on the strand.

A. Hatch No. 1, port side, 5.20 meters; hatch No. 2, port side, 5.10 meters; hatch No. 3, on the port side, 2.90 meters; by the engine-room, 4.95; hatch No. 4, 6.20.

Q. Have you got a sounding there, Captain, at the stern of the ship, aft of No. 4?

Mr. Haight: Have you got any more soundings than you gave us?

The Witness: I have for the other side—starboard side.

Q. They appear in your logbook, Captain, and we can read them. Then it is true, is it not, that on that point you can't help us? You don't know how much water you had aft?

A. On the inside it was less than it was on the outside.

Q. On the outside you have 8.20 meters?

A. Yes.

Q. So there you were afloat at No. 4, were you not?

A. Yes, on the after end of No. 4. No. 4, 6.20, she wasn't afloat by that.

Q. You testified in answer to Mr. Haight's question, that you found the rudder blade absolutely straight?

A. Yes.

Q. What basis is there for any such testimony, Captain?

A. That is what the others told me—all the captains and engineers and the diver.

Q. That is based on what these other men told you?

A. Yes, and so far as I could see from the dock.

[fol. 141] Q. But you couldn't see very well from the dock, could you?

A. Well, by that light they had.

Q. How high up was the side of this dock where you were standing?

A. It was just even with the deck.

Q. How many feet is it from the deck down to the top of your rudder?

A. That is about 20 feet, I guess.

Q. So that your only examination of the rudder was first standing on this bridge across the drydock——

A. Yes.

Q. Where you stood up to the point where the water was reduced to half-way down on the rudder?

A. Yes.

Q. And then looking at the rudder from a point from which you were standing on the side of the drydock, about 20 feet above the top of the rudder?

A. Yes.

Q. And from that point you looked down on the rudder?

A. Yes.

Q. And you feel, do you, Captain, that that examination, which was the only examination you made, justifies you in telling us that the blade of the rudder was absolutely straight?

A. Well, you see I couldn't go with them in the boat. There were too many men there.

Q. I am not asking you about——

A. But I believe the men just the same as if I would go down.

Q. Then we come down to this, do we not, Captain, that your testimony is not based on your own examination at all, but based on what these other men told you?

A. Yes.

Mr. Haight: Plus what he saw, is what he said.

The Witness: And from what I saw.

[fol. 142] Q. You didn't see much, did you, Captain?

A. If I looked down along the after end of the stern I could see a lot.

Q. When was that you were standing on the side of the dock looking at this rudder?

A. Well, it was about five.

Q. It couldn't have been that, could it, Captain? You told us you only went into the drydock at five.

A. No—4:10.

Q. That is my error. I understood you to say that you used a searchlight, and by the use of this searchlight that you could examine the rudder under water. Did I understand you to say that?

A. Yes.

Q. What kind of water is in this drydock, Captain—isn't it the Weser River water?

A. Yes.

Q. The Weser River is very dirty, isn't it?

A. It wasn't very dirty, it was about high water.

Q. And it is your testimony that this electric light—it was an electric light, wasn't it?

A. Yes.

Q. (Continuing) Which they used in the examination of this rudder, permitted them to look down through 3 feet of the Weser River water and see the condition of this rudder underneath the water? Is that your testimony?

A. Yes, I think they could see about 2 feet with it—2 feet down. That is a very strong searchlight that they had.

Q. What was the purpose of that pretty little by-play of lashing that rudder again—so that no one would know you had unlashed it?

A. Well, I did it—if I didn't lash it it would be the same if I didn't lash it.

Q. Why did you lash it then?

A. Well, I told the boatswain to lash it again.

Q. I know you did, but why—what was your purpose in doing it, trying to deceive someone, or were you——

[fol. 143] Mr. Haight: Objected to. I don't think it is fair to characterize the actions of a witness, who has voluntarily testified, as trying to deceive anyone.

Q. Was it your purpose to deceive anybody?

A. I thought most if anybody was comng on the boat to see how the rudder was, it was just in good shape like it was when we left.

Q. Apparently it was your purpose to deceive somebody?

A. No, I didn't think there was anybody coming to see that.

Q. But if anyone did come, why you wanted it to be in position to show just the same as when you left Bremen?

A. I just show them how it was when we left.

Q. Why did you want to show them that?

A. Well, I didn't had to, I know it wouldn't make any difference.

Q. There may be a difference of opinion there, Captain, but I must confess I don't understand what the purpose of it all was, and if you wish to tell us anything more about it we will be glad to hear you.

A. The lashing was hanging there, and the boatswain just tightened it up again like it was before.

Q. After the ship went into drydock, after the second stranding, when she returned to Bremen, you knew, did

you not, that a lot of different men examined the ship in drydock?

A. Yes.

Q. And that they examined the lashings—you knew that, did you not?

A. There was nobody examined the lashings.

Q. There wasn't?

A. No.

Q. And no one examined the brake on your rudder?

A. No.

[fol. 144] Q. Are you sure of that, Captain?

A. I didn't see anybody examine that.

Q. Perhaps, I should, in fairness to you, tell you that several men have testified they did—your superiors.

Mr. Haight: They say they saw things but didn't say that they examined them.

A. I didn't see anybody examine the lashings or the screw on the quadrant.

Q. So you don't know anything about that?

A. I was there all the time, but nobody examined it that I know anything about.

Q. You didn't know that these various men were comparing the conditions found after the second stranding with the condition in which they knew the ship was in when she sailed from Bremen?

A. After the second stranding, all the men who was down on the dock, they didn't care no more for the rudder, they just seen the damage on the bottom of the ship, they didn't take any notice of the rudder at all.

Q. You haven't quite answered my question.

(Question repeated.)

Q. Do you understand my question, Captain?

A. Yes.

Q. If you don't know, say so, it is quite all right.

A. Well, I didn't know there was anybody there to examine the rudder again.

Q. At the time you were sailing from Bremen, after the first stranding, you said that there was some captain—I didn't catch his name—who told you you could have as many tugs as you wanted. Who was that?

A. Captain Reichenbacher, our engineer director.

[fol. 145] Q. That is the same man to whom you have already referred?

A. Yes.

Q. And he knew that you thought three tugs were enough and were going to take three tugs?

A. Well, he asked me if we have enough with three tugs, so and so many horsepower, I said "Yes, that is plenty."

Q. About the time of sailing, Captain Reichenbacher was fully familiar with the fact that you planned to sail that night, was he not?

A. Well, he asked me what time we were going to sail, and I said, "Well, I think the best time is tonight."

Q. Did you tell him what time?

A. Well, we have to sail after low water.

Q. Do you remember when it was that you had that conversation with Captain Reichenbacher?

A. That was between 6 and 7 that night.

Q. Were you familiar with the fact that a certificate of seaworthiness was requested for your ship from Captain Julicker?

A. Captain Reichenbacher told me he was going to arrange that with Captain Julicker.

Q. You yourself had no conversation with Captain Julicker?

A. No.

Q. That was entirely a matter between Captain Reichenbacher and Captain Julicker?

A. Yes.

Q. However, you knew that you had no certificate of seaworthiness when you sailed from Bremen?

A. If I knew?

Q. You did not have a certificate of seaworthiness?

A. No.

Q. And you knew that your ship had not been surveyed by anyone in a position to issue a certificate of seaworthiness?

A. No, he wasn't there, the man from the German Lloyd, but he believed what Captain Reichenbacher and the other [fol. 146] man told him. He said he was going to give them the certificate and send it to Hamburg, and that is what Captain Reichenbacher told he too.

Q. After you first took your course to starboard, to make way for this ship coming up, slightly below kilometer

16, how soon was it that you noticed that the ship was getting in a dangerous condition?

A. Well, we had just the middle of the channel at that time when we saw the steamer, and I say to the pilot, "We are just in the middle of the channel, isn't that dangerous for our tug on the port side," and he said "Yes, we will change the course a little to the starboard."

Q. How soon after that was it that you realized that you were getting in a dangerous predicament in relation to going aground?

A. We always have to keep our starboard side going up and down that channel, if there is a boat coming in the opposite way we have to keep the starboard side of the channel.

Q. I guess it is clear you haven't understood my question. I want to know how soon after you changed your course to get by this other ship, you realized that you were in danger of stranding?

A. As soon as the other boat passed us we tried our best to get her back to the middle of the channel.

Q. Just as soon as she went by?

A. Yes.

Q. That would be just a question of a few minutes?

A. Yes.

Q. Then what efforts were made to do that?

A. Why, we give the starboard tug to go full speed ahead and the port tug full speed astern, and the tug ahead she pulled out to the port side.

Q. You might mark on this chart (Respondent's Exhibit [fol. 147] 8) where it was that this ship passed you.

A. It was here (indicating).

Q. That is the place marked "3.40"?

A. Yes.

Q. At that point, at 3.40, this ship went by you?

A. Yes.

Q. And as soon as she got by you, as I understand you, you immediately made efforts to get back to the center line of the channel?

A. Yes.

Q. And to shorten it up—I think you told Mr. Haight that the tug ahead pulled to port, the tug on the port went astern, and the tug on the starboard went full speed ahead?

A. Yes.

Q. And also your own propeller, at port, went astern, and at starboard went ahead?

A. Yes.

Q. And yet the ship kept tending toward the starboard side of the bank?

A. She was still going the same way, close to the shore again, starboard side.

Q. That must have been very dangerous to you—you knew it at that time?

A. Oh, yes.

Q. And in spite of all your efforts, you just could not get her pointed back toward the center line of the channel?

A. No.

Q. This difficulty of getting her back into the center line of the channel you noticed long before the time when you said you hit astern—that is so, isn't it?

A. Yes.

Q. When she returned to Bremen, after the second stranding, then you had the dock completely pumped out so it was dry, did you not?

A. Yes.

Q. Had you discharged your cargo in the meantime?

A. We had discharged all the cargo.

Q. What was the reason for picking out the night-time to go down the Weser River from Bremen?

A. Well, at night there is not so much traffic in the river—all the small boats, tugboats and lighters, that tow [fol. 148] up and down the river, they don't work at night.

Q. Why were you worried about the traffic?

A. Well, lots of boats they go at night, don't care for daylight. If they have a clear night it is just as good and better than the daytime.

Q. Under ordinary conditions you don't—or do you—choose the night for sailing when you are in a port?

A. Yes.

Q. You always do?

A. Yes. We work in the daytime, discharging or unloading, and at night we sail, that is an old fashion.

Q. And I take it from your testimony that you thought that there was nothing so unusual about the condition of this ship but what you could sail in the night time?

A. Yes.

Q. That is the situation?

A. Yes.

Q. You spoke of the moonlight being quite clear that night?

A. Yes.

Q. You don't suggest, do you, Captain, that you were able to navigate your ship with the same facility in the moonlight as you could in the daylight?

A. Well, every sailor is happy if he gets the moonlight at night.

Q. But he prefers daylight, doesn't he?

A. Yes, sure.

Q. You testified before the Seeamt at Bremerhaven, did you not?

A. Yes.

Q. Didn't you tell the Court there that your ship showed a tendency to go to starboard from the time you left Bremen?

A. No.

Q. Did you tell any of the individual members of that Court of that?

A. No.

Q. In your direct testimony, you told us that the ship hit aft at 3.49, and you gave that testimony after examining your maneuver book?

A. Yes.

[fol. 149] Q. What is there in your maneuver book that justifies you in telling us that that was the time when you hit aft?

A. Well, it was just a little before we had our stranding.

Q. And your stranding was at 3.52?

A. Yes.

Q. And subsequently, in answer to Mr. Haight's question, you told us that the stop shown in your maneuver book at 3.49 was the occasion when you almost fouled the chain of the buoy?

A. Yes.

Q. Well now, which is it?

A. Well, I can't say exactly when the ship hit the bottom aft, if it was 3.49 we passed that buoy, that is the time we stopped the engine.

Q. That is, all you know about it is that this maneuver book shows you stopped the engine then?

A. Yes.

Q. But that doesn't establish either when you almost fouled the chain of the buoy or when you stranded aft, does it—in other words, you don't know why you stopped at 3.49?

A. Well, we had to stop about that buoy and that buoy chain.

Q. I see you stopped here at 3.49?

A. Yes.

Q. Why did you stop at 3.49?

A. That is at the time we passed the buoy we had on our starboard quarter.

Q. It is not the time then when you stranded aft or hit aft?

A. No, it is a little later.

Q. It is a little later than you hit aft?

A. Yes.

Q. How much later—a couple of minutes?

A. No, not a couple of minutes. A minute is a long time in a case like that.

Q. Yes, I think we agree on that. You don't know exactly?

A. No.

Q. But it was sometime after that?

A. Yes.

Q. I didn't quite understand—I would be glad if you [fol. 150] would explain it to us—what the reason was for sailing exactly at the time you did. You told us something about the necessity of stopping at Brake. As I understand it, there is a shallow spot in the river below Brake?

A. Yes.

Q. You started about an hour and 20 minutes after low tide?

A. Yes.

Q. Who was it that decided that you would sail at that time?

A. The pilot.

Q. And what was the reason for starting at that time?

A. Well, we couldn't start before, there was not water enough.

Q. There wasn't water enough where—in the dock?

A. No, all the way down. You see here you have 21 feet and 19 feet at low water (indicating).

Q. So you had to wait for an hour and 20 minutes so you would have more water——

A. Yes.

Q. (Continuing)—in that part of the river before you got to Vegesack?

A. Yes.

Q. Of course the water would be increasing in depth all the time.

A. Yes.

Q. And then when you got to Brake, what was the point you had to tie up there?

A. You had to tie up on the wharf and wait for flood again.

Q. What do you mean by again?

A. For the next flood tide.

Q. Wouldn't you go to Brake before this tide was flood?

A. Yes, we go to Brake, but then if we pass Brake, we have the ebb tide then.

Q. Then the situation was that you would tie up at Brake so that you would go down against a flood tide?

A. Yes.

Q. Because that would make navigation more easy?

A. Yes.

Q. Was that because of the difficulty you were having [fol. 151] with your rudder?

A. Well, lots of ships have to do that.

Q. You do not suggest, do you, Captain, that ships sailing from Bremen make a practice of always tying up at Brake and waiting for another tide?

A. Well, that depends on the draft what the ships have.

Q. Well, a ship as large as yours or larger, is it your testimony that you understand that all ships having a size like the "Isis" or larger, could not go down in one tide from Bremen?

A. If they are drawing too much, too deep, they have to stay somewhere again, Brake, for instance.

Q. Then it is your testimony that it is necessary always to tie up at Brake if she is drawing a depth such as the "Isis," or more?

A. Up to that time, yes.

Q. You mean that year?
A. Yes.
Q. You mean it has been deepened since then?
A. Yes.

Adjourned to 10.45 A. M., October 10, 1930.

Met pursuant to adjournment, 10:45 A. M., October 10, 1930.

Present: As before.

Same stipulation as heretofore noted.

PAUL KRUEGER resumes the stand.

Cross-examination.

By Mr. Longley (continued):

Q. Captain, when we adjourned yesterday, we were speaking about the fact of tying up at Brake and waiting for the next tide?
A. Yes.
[fol. 152] Q. I just want to go into that for one or two questions more. Am I to understand that it is your thought that no ship with the draft of the "Isis," or more, in 1928, could proceed from Bremen to the sea on one tide?
A. That is what the pilot told me.
Q. That is all you knew about it?
A. Yes.
Q. Now, you actually sailed an hour and twenty minutes after low tide?
A. Yes.
Q. What was the reason for sailing an hour and twenty minutes after the tide—was there any particular reason?
A. No.
Q. You were ready to sail at that time?
A. Yes, sir.
Q. You said something—I want to be fair with you—I recollect you said something about the lowness of the water required you to wait. That doesn't seem consistent with your answer.
A. We could leave an hour later but I don't think we could leave before that.

Q. The depths to which you referred, which prevented you from sailing prior to the time you did sail, are the soundings which appears on this chart marked Respondent's Exhibit 8—off the docks here?

A. Yes.

Q. What was the draft of your ship aft?

A. 23 feet 3 inches.

Q. And I take it these soundings which appear here, of 20 and 21 feet, or the soundings to which you referred, were less than the draft of your ship, so you were waiting for more water?

A. Yes.

Q. In 1928, it is true, is it not, Captain, that the river was very difficult for navigation because of the narrowness of the channel and of the shallowness of the water at various points?

A. Yes, they are dredging there all the time, but besides [fol. 153] that they cut 50 meters off here on this side (indicating).

Q. At Vegesack?

A. On the port side, on the other side of the Lesum.

Q. You mean they have since this accident of yours?

A. Yes.

Q. I was referring to that time, the time of this accident. It is true, or rather it was true, was it not, that navigation in the river was very difficult because of the sharp turns, because of the narrow channel and because there were places where the water was very shallow?

A. Yes.

Q. A ship in perfect condition finds navigation very difficult going down the river, does she not?

A. Yes.

Q. For the reasons we have just mentioned?

A. Yes.

Q. By the way, Captain, after that first stranding, when you were going up to Bremen, there was no damage to your ship other than the damage to the rudder, was there?

A. There was no damage to the ship—only the rudder.

Q. You told us yesterday, Captain, that you testified before a Board or Court at Bremen or Bremerhaven, after your second stranding—a Court called the Seeamt?

A. Yes.

Q. It is true, is it not, Captain, as apparently you testified before this Court, that when you sailed there was some talk about the wind then blowing?

A. When I sailed the second time——

Q. No, the first time, from Bremen?

A. Yes.

Q. Was there not some hesitation about sailing because of the wind?

A. When I sailed from Bremen, you mean?

Q. Yes,

A. Well, there was a little strong wind before we started. [fol. 154] Q. You and the pilot had some discussion on that point, did you not?

A. Yes.

Q. And there was considerable hesitancy about sailing because of that wind?

A. Well, as soon as we started, the wind slacked down, it wasn't so strong any more.

Q. And therefore you felt it safe to sail?

A. Yes.

Q. In this testimony, a transcript of which I have before me, Captain, it is stated that you told the Court that on your voyage down from Bremen, the vessel did not answer her starboard helm, but had the tendency to sheer to starboard. Now, am I to understand from your answers to Mr. Haight's questions, that you deny you said any such thing?

A. No, I didn't.

Q. You do deny it then?

A. No, not at the time when we sailed from Bremen.

Mr. Haight: Did you make such a statement?

The Witness: No, I didn't.

Q. Captain, I note here that you were not sworn as a witness before that Court, Do you recall you were not sworn?

A. Yes, I have.

Q. You were sworn?

A. Yes.

Mr. Haight: Before the Seeamt?

The Witness: Yes.

Q. There is a statement here that you were unsworn—that is incorrect, is it?

A. Unsworn?

Mr. Haight: Did you hold up your hand and swear to tell the truth and nothing but the truth, before the Seeamt inquiry?

[fol. 155] The Witness: I don't know if I did or not.

Q. Do you recall whether you were asked to take the oath or not?

A. What do you mean?

Q. Were you requested to hold up your hand and tell the truth?

A. I said I can't remember that.

Q. You don't recall anything about it?

A. No.

Q. But, in any event, whether you were sworn or unsworn, it is perfectly definite in your mind that you made no such statement as appears in this transcript of your testimony—that is clear in your mind, is it?

A. Yes.

Q. Was there not, as a result of the second stranding, a little entry of water into your ship?

A. Well, it was just in the tank underneath the No. 3 hatch.

Q. It was in such small quantity that your bilge pumps took care of it, I understand?

A. Yes.

Q. But it is not true that your cargo sustained a small amount of damage—not more than a few hundred dollars?

A. No, I don't think there was any damage.

Q. That is not a matter you are thoroughly familiar with, is it?

A. Well, I don't know anything about that.

Q. Captain, in answer to Mr. Haight's questions, I understood you to say that you always knew exactly where you were in the ship's channel, is that so?

A. Yes.

Q. Well, you weren't familiar with the ship's channel, were you?

A. Well, it depends on the speed we made and maneuver from the engine. I figured it out from that.

Q. I don't think you quite understand my question. I didn't mean your position back and forth in the channel, [fol. 156] but you stated in answer to Mr. Haight's questions, as I understood you, that you always knew how far you were from the side of the bank in the channel?

A. Yes.

Q. Well, how did you know that—you weren't familiar with the channel, were you?

A. I could see that.

Q. See what?

A. I could see the land on both sides, and the lights.

Q. Now, it appears in your testimony here, Captain, before the Seeamt, that you stated at that time, at the time you gave your testimony "the distance from the easterly river bank could not be estimated." Do you deny that you made that statement.

A. The bank?

Q. Yes.

A. Not the shore, you mean—the bank is under water, so I understood.

Q. You could not estimate it?

A. Well, I say I can't see the bank under water, I just say where in the middle of the channel, I could see by the lights and the shore.

Q. Well, the lights mark the river bank, don't they under water?

A. No.

Q. Don't they denote the channel?

A. Lights are right on the shore.

Q. The lights are on shore?

A. Yes.

Q. Then what is the explanation of your testimony that you knew you were in the channel, if the lights were on shore?

A. I could see that.

Q. What was there denoting the channel—it wasn't the lights, apparently?

A. The lights and the shore, I say.

Q. But your channel does not go up to the shore, of course, Captain?

A. No, not quite to the shore.

Q. You have buoys marking your channel, have you not?

A. Not on this way (indicating)—yes, we have some of [fol. 157] them here, but we can't see it on this map (Respondent's Exhibit 8). We have some buoys laying here, but they are not here on this map.

Q. What I am getting at, Captain—you have told us that you knew your ship was in the center of the channel as you went down?

A. Yes.

Q. I don't quite make out how you knew anything about it, as the lights did not mark the edge of the channel, as you say they were on shore, and you yourself were unfamiliar with the river?

A. The lights are just on the edge of the shore on both sides, and they have some buoys laying on the starboard side where the bank is.

Q. Do you mean you could see the buoys?

A. Yes. Maybe you can see it on this map (Respondent's Exhibit 8).

Q. Do you deny that in your testimony before the Seeamt Court, you said that the distance from the easterly river bank could not be estimated?

A. From the easterly river bank—I don't know—if I say that I can't remember.

Q. There is no suggestion, is there, by you, that when you turned to starboard to permit this other ship to pass you, that you grounded at that time?

A. No, not at that time.

Q. And you passed that ship, or that ship passed you, about a quarter of a mile from the place where you eventually fetched up—that is where you stranded, is it not?

A. A quarter of a mile?

Q. Yes. Do you understand my question?

A. We passed the boat a quarter of a mile——

Q. No—where you and that other ship passed was about a quarter of a mile from the place where you eventually stranded?

A. Yes, that is right, a quarter of a mile, from here to there (indicating on Respondent's Exhibit 8)—that is a [fol. 158] quarter of a mile. It is about 600 meters—500 to 600 meters.

Q. I am quite a little interested, Captain, in that part of your testimony where you said that you hit aft. I have

already examined you about it. Is it your suggestion that you hit the severe blow aft or a mere touch?

A. It was a touch.

Q. Just a touch?

A. Yes—twice.

Q. Was it a touch sufficient so all the officers on the ship would have known it?

A. Well, all the officers—there was only one on deck at that time.

Q. Well, it was not severe enough so that those that were not on deck would have noted it?

A. I don't think they would have noted it. Even in the engine room they didn't know anything about that. The tugs alongside were bumping against the ship so they didn't take any notice of it.

Q. Isn't it quite possible that what you thought was a touch of the rudder was your tug hitting against the ship?

A. No, it was a different touch altogether.

Q. Different in what way?

A. I mean if the ship is touching the bottom, it is a different touch than if the tug is going against the boat, so everything is shaken, the gear and the masts.

Q. Was any comment made by you to any of your officers about this touch?

A. Well, the second officer said "She is touching the ground," I said "I know that."

Q. Who is the second officer?

A. Ulffers is his name.

Q. How do you spell it?

A. U-l-f-f-e-r-s.

Q. Did he testify before the Seeamt?

A. He wasn't there.

Q. He was not there?

A. No.

[fol. 159] Q. At the time of your testimony before the Seeamt, you made no statement whatever about touching your rudder or touching aft before the eventual stranding, did you?

A. I can't remember if I did or not.

Redirect examination.

By Mr. Haight:

Q. When you appeared before the Seeamt, did you make a statement, or were you simply answering questions as put to you?

A. I simply was answering questions.

Q. If the question weren't put, you didn't volunteer the information?

A. No.

Q. After the discussion that we have had, are you clear in your recollection that your ship did touch bottom twice?

A. Yes.

Q. Before she finally fetched up hard aground?

A. Yes.

Q. When the stern hit the bottom, which way was the bow swinging?

A. To the starboard.

Q. Which way was the stern swinging?

A. If the bow swings to the starboard, the stern swings to the port.

Q. In other words, the swing is approximately amidships, and the bow goes one way and the stern the other?

A. Yes.

Q. When you reached Bremen the second time and were docked the second time, you found, as you have testified, that the rudder blade had been bent from about the middle down?

A. Yes.

Q. A slight bend of about 5 degrees?

A. Yes.

Q. When in your judgment did that bend occur?

Mr. Longley: I object to the question as calling for the witness' speculation.

[fol. 160] A. Well, I think that bend—we get that bend on the first time we touched the ground with our stern—I mean on the trip down from Bremen on the Lesum.

Q. When the boat hit twice in the vicinity of the buoy at the Lesum bank, and before she finally swung around across the river?

A. Yes.

Q. Please state again, Captain, whether, as you came down the river from Bremen and approached the Lesum, you were able to tell when your ship was in the middle of the channel?

A. Yes.

Q. Now, how could you tell?

A. The time we start and I see by the maneuver book, and the time we swung around and we passed the lighthouse here——

Q. I am not discussing the times. I will put it another way—is the center of the channel, going down to Vegesack, approximately between the red lights along the side of the river—in the center of that space?

A. In the center of the space?

Mr. Longley: I object to the question on the ground that the witness said he is not familiar with where the channel was.

Mr. Haight: He has been up there at least three times.

Q. You have red lights on both sides of the river?

A. White lights.

Q. You have white lights on both sides of the river all the way down?

A. Yes, down to here—to the Lesum.

Q. Had you at least looked at the chart of the river?

A. Yes.

Q. Before?

A. Yes.

[fol. 161] Q. And you had navigated it three times?

A. Yes.

Q. Did you know from the chart and from your experience approximately where the deep water was?

A. Why, the deep water is in the middle. Just two steamers can pass very close to—that is all—we have not much space to pass each other, and especially here near the Lesum they have to pass very close. Sometimes it looks like as if they are running into each other.

Q. Am I correct then, that you knew approximately where the center of the channel was?

A. Yes.

Q. But you didn't know exactly how wide the channel was or where the bank was under water at each spot along the river?

A. No, not that, but I know just the middle, that is all, but how far the bank was going out I don't know—just when we passed the buoys here.

Q. I asked you yesterday, Captain, to give me the names of all the ports at which your vessel had loaded cargo before she made the transatlantic voyage for Bremen, on which this accident occurred.

A. I missed one port—it was Punta Arenas.

Q. You also loaded cargo there?

A. Yes.

Q. Where is Punta Arenas?

A. Costa Rica.

Q. Did you stop at any other port?

A. In Cristobal.

Q. What did you stop at Cristobal for?

A. I had coffee from Punta Arenas on the hatches, and I covered them over with tarpaulins, and the agent there told me to discharge this coffee in Cristobal, but when I arrived there, the agent in Cristobal told me "You can't discharge any coffee here from the northern ports." I said "What are you going to do," and he said "Take them to [fol. 162] Hamburg." I say "I wouldn't leave the port with this coffee on deck." Then he said "Then you have to discharge some other freight and leave the coffee on board, but you can't discharge the coffee."

Q. Why did you go to Cristobal at all—to discharge the coffee, is that right?

A. To discharge the coffee.

Q. I don't think we are particularly involved in this other story, but what happened at Cristobal, you restowed your cargo?

A. Yes.

Q. Did you put something ashore?

A. Yes, I put prunes ashore from San Francisco.

Q. Did they go forward on some other ship?

A. Yes, they went forward on some other ship.

Q. Please state whether or not, when you left Punta Arenas, and when you left Cristobal, your ship was fully manned—did you have the same crew that you had before—same officers?

A. Well, the officers, they change every trip.

Q. They didn't change at Cristobal, did they?

A. No, no, not on the trip.

Q. Or at Punta Arenas?

A. No.

Q. No change made in your crew at either of those ports?

A. No.

Q. Was your ship fit and seaworthy in all respects when you sailed from Punta Arenas and when you sailed from Cristobal?

A. Yes.

Q. Was your cargo properly stowed at both of those ports?

A. Yes.

Q. Did you ever have any trouble on the voyage——

A. No.

Q. (continuing) with the cargo or anything else?

A. No.

Q. In Mr. Longley's cross examination yesterday, you were asked if, when your vessel stranded the first time, your stern swinging across the river, your rudder hit with [fol. 163] terrific force, and you were asked if the twisting of your rudder stock did not mean that the rudder had received a severe "blow." As a matter of fact, what was the character of the bottom of the river at the point where you first stranded and then swung across the river?

A. That is all soft mud there.

Q. Was it soft on both sides of the river?

A. Yes, sir.

Q. When your stern swung across the river, did you feel any shock of a terrific blow or a terrific force of collision?

A. No, it was very soft when the ship struck there.

Q. I understand you to say that at the time you didn't think that your rudder had been damaged at all?

A. No.

Q. It was only when you started to steer the boat that you found her sheering?

A. Yes. I want to make another notice about that—I thought something was wrong with the steering engine, so I wired to Bremen "I can't steer, there is something wrong with the steering gear," so they phoned up to Hamburg and they sent two engineers over to the ship to overhaul the engines, and they say, "There has nothing happened to the engines."

Q. In your cross examination yesterday, you testified that the lowest point that the water was pumped down, during

the first docking, was to the next to the lowest arm on the rudder blade, and you marked that with a cross?

A. Yes.

Q. You had also told me earlier in your direct examination, that you thought that the water had been pumped down at the lowest until it was about 2 feet from the bottom?

A. Yes.

Q. Well, now, which is correct—the first arm is very much more than 2 feet above the bottom of the rudder [fol. 164] blade, is it not?

A. Well, I don't know exactly——

Q. As a matter of fact, it is a quarter of an inch—it is 25——

A. You can see the second arm here (indicating).

Q. It is over 4 feet from the bottom of the rudder up to the first arm, as I take it, and your whole rudder is something over 16 feet from the bottom to the top? (Witness measures on Respondent's Exhibit 6).

A. You see I could see this arm.

Q. You could see—how much of it—you could see the whole of it?

A. Yes.

Q. Could you see anything below it?

A. No, not below the arm.

Q. The line of the water then was just below the bottom of the arm?

A. Yes.

Q. You were asked on cross examination if there wasn't serious risk of straining your ship when they pumped out so much water, docking her with her cargo aboard. About how many tons do you figure to the inch, when she is drawing only 3 or 4 feet of water—what does your immersion scale show at that point?

A. 40 tons to the inch.

Q. So that if you had 36 inches of water, that would amount to about—something over 1400 tons?

A. Yes.

Q. Support?

A. Yes.

Q. As a matter of fact, during the short interval that the "Isis" was on dock at the first time, to inspect the rudder, did she sustain any damage?

A. No.

Q. When you docked her the second time, after she had been discharged, where did you find the stranding damage?

A. That was mostly just in the amidships underneath No. 3 hatch.

[fol. 165] Q. Did you find any indication, forward or aft of the damaged places, that the blocks in the dock on the first docking had dented the plates or that she had been in any way damaged by the first docking?

A. I heard some engineers talking in Kiel when we were in the dock there, that they had some—what do you call that—some plates were a little bent in just on the bottom—they had to take them out—and some other places.

Q. Was there anything to indicate where those plates had been bent, and when?

A. I didn't see it any more. I went off the boat then.

Q. You personally didn't see anything there?

A. No.

Q. You don't know what plates they spoke about nor where they were?

A. No.

Q. So far as you know, was there any damage of any kind done at the first docking in Bremen?

A. No.

Q. You were asked if the weather wasn't cold in February, and about the men who put their arms into the water to feel down on the rudder. Who was it, if you remember, felt down under water?

A. I think it was the engineer of the dock, and Mr. Schubert, but I can't remember exactly who it was, but I saw some men feeling around there.

Q. How far under water did they put their arms?

A. They had their arms in up to here and feel down (indicating shoulder).

Q. That is the whole length of the arm?

A. Yes.

Q. You stated yesterday on cross examination, that up to the time that you reached the 17th kilometer, just above the Lesum, your ship had no tendency to sheer as the tugs towed her down?

A. Yes.

[fol. 166] Q. And that the changes in the channel above the Lesum were so slight as not to make any serious difference. Will you please tell me whether or not, before

you got to the 17th kilometer, you were, in fact, using your propellers to assist in steering your ship as the channel bent in one direction or the other?

A. Yes, we used both engines from time to time, just which way she was going.

Q. Your maneuver book shows precisely what was done?

A. Yes.

Q. You were asked, with reference to the maneuver book yesterday, whether the different times which you have indicated on the chart (Respondent's Exhibit 8) were mere guesses. What do you understand to be the meaning of the word "guess"?

A. I don't know what it is—guesses.

Q. Do you draw any distinction between guess and estimate or guess and think, or guess and judge?

A. I wish I could answer in German.

The preceding question is interpreted by Mr. Knauth.

The Witness: I made no guess. I estimated from the maneuver book and the stretches along which we ran through the various maneuvers.

Q. Are you still of the opinion, Captain, that the times which you have written along the chart (Respondent's Exhibit 8) represent, with approximate accuracy, the positions in the river of the "Isis" at the times stated?

A. Yes.

Q. You were asked on cross examination about your certificate of seaworthiness. What statement had been made to you about the certificate before you sailed from Bremen?

[fol. 167] Mr. Longley: I object to the question as calling for hearsay.

A. My boss, Captain Reichenbacher, he told me, "I fixed it up with the seaworthy part, with Mr. Julicker," and took it over to Hamburg. He was going to train to Hamburg.

Q. Captain Reichenbacher was going to Hamburg?

A. Yes, this was 7 o'clock at night.

Q. And the certificate was to be sent where?

A. He said he is going to fix it up with Mr. Julicker, and he is taking the seaworthy certificate along with him to Hamburg, so I shouldn't worry about that.

Q. Was he to take it with him or was he to get it at Hamburg?

A. No, he was going to take it with him, that is what he told me.

Q. Where was Mr. Julicker?

A. I think he was at home.

Q. In Hamburg?

A. No, in Bremen.

Q. You don't know precisely where Mr. Julicker was, but you were told that your certificate had been arranged for?

A. Yes.

Q. You were asked on cross examination yesterday, whether you would prefer moonlight or daylight. You had previously stated to me that with the river lighted as it was, clear weather, and the moon shining, you considered it perfectly appropriate to sail at night?

A. Yes.

Q. Now, did your statement on cross examination, that you preferred daylight to moonlight, mean that you had changed your opinion on that point?

Mr. Longley: I must object to the question on the ground that my friend is now cross examining his own witness.

[fol. 168] A. At night the see all the lights just the same —I don't see them in the daytime—we have the shore in the daytime. By moonlight, I can see the shore too, and besides that, I can see all the lights.

Q. Why did you say that you preferred the daylight?

A. Prefer?

Q. Do you know what the word "prefer" means?

A. No.

Q. Was there, in your judgment, any reason for not sailing at night—was there any objection to sailing?

A. Yes—at night, we have not so much traffic in the channels.

Q. Is that better or worse for you?

A. That is better, of course.

Q. It is then an advantage, as far as the traffic is concerned?

A. Yes.

Q. Who was it that decided the question as to whether you should or should not sail at night?

A. It was nobody who was telling me what time I should sail.

Q. Do you know whether the subject was discussed with the chief pilot?

A. Well, Captain Reichenbacher said what time I wanted to sail and I said "It depends on the pilot, he got to say, he knows the draft of the ship and he might come on board at the right time." So Captain Reichenbacher went up to the chief pilot and ordered the pilot for tonight and also the tugs.

Q. And the pilot came and you sailed?

A. Yes.

Q. You were asked on cross examination if the river Weser is not difficult, even for a ship in perfect condition —difficult to navigate because of the narrow channel etc.?

A. Yes.

Q. Do you happen to know whether ships that are in perfect condition sometimes take a tug to assist them, if [fol. 169] the weather conditions or the tidal conditions aren't altogether favorable?

A. It is usual to take tugs coming up the river from here, from the Lesum or from Vegesack, up to Bremen, or back from Bremen to Vegesack.

Q. In other words, no matter how perfect a ship is, it is easier to manage her if she has a tug?

A. Yes.

Q. When you started from Bremen, Captain, was the wind blowing so hard that you thought it was unsafe to go?

A. No, it wasn't so hard.

Q. Captain, you have been asked some questions on cross-examination, regarding your deck log. The translation of the log has been submitted to the other side and it doesn't seem to me necessary to put it in the record, but I would like to have you identify the book. Is the book which I show you, the deck log of the "Isis"?

A. Yes.

Q. Covering this voyage, among others?

A. Yes.

Q. Is that the book of original entry?

A. Yes.

Q. The entries are written up in that book first?

A. Yes.

Q. Do you remember the handwriting of the different officers on the 10th day of February?

A. Yes.

Q. Page what?

A. Page 94—was the second officer.

Q. A page runs clear across the book?

A. Yes.

Q. The first entry on the righthand side of the page is made by whom?

A. The second officer Ulffers.

Q. Does he sign it or do you recognize his handwriting?

A. He signed it "Ulffers."

Q. And the next entry is written by whom?

A. On the stranding place, that is the chief officer—it is not signed—just three letters.

[fol. 170] Q. Just his initials?

A. Yes, "S. C. H."

Q. And the next entry—the last half of the page?

A. Well, that is in port.

Q. In whose handwriting was that?

A. The chief officer's.

Q. And those are the first entries that were made with reference to the subjects covered by them?

A. Yes.

Mr. Haight: I ask to have the deck log marked for identification.

It is marked Respondent's Exhibit 11 for Identification.

Q. Will you also state whether or not that is the engine-room log of the "Isis" covering this particular period (handing witness another book).

A. Yes.

Q. Look at the entries for February 10th and tell me whether you know the handwriting of those entries?

A. I don't know these—well, that is the chief engineer, F. S. Fohrmann.

Q. It is signed?

A. Yes.

Q. Is that the book of original entries, too?

A. No, it don't look like it—no.

Q. This is the smooth log?

A. Yes.

Mr. Haight: I ask to have the smooth engine-room log marked for identification.

(It is marked Respondent's Exhibit 12 for Identification.)

Recross-examination.

By Mr. Longley:

Q. Captain, in answer to Mr. Haight's question, I understood you to say that there was a mud bank where your [fol. 171] ship stranded the first time?

A. Yes.

Q. And when you swung and hit the rudder against the bank, it was merely a soft blow?

A. Yes.

Q. I notice in your logbook, Captain, appear the words, "She ran with her stern forcibly against the easterly bank and went aground."

A. Well, she was fast there for a little time.

Q. Do you want to examine your logbook, Captain—that is on page 92, apparently—on the left side of page 93.

(Witness examines log.)

Q. Haven't you an entry there that you hit the bank forcibly?

A. I didn't have it yet—yes.

Q. Captain, in relation to the immersion of your ship, you told us that she was 40 tons to the inch—that is, your deadweight scale is 40 tons to the inch?

A. Yes.

Q. That is at your load line, isn't it, Captain?

A. Well, it isn't much difference between the load line and further down—maybe one ton.

Q. Not more than that?

A. No.

Q. Is there, by chance, a deadweight scale posted in front of your logbook there?

A. No.

Mr. Haight: Where could we get a scale?

The Witness: Well, they have them in Hamburg, I guess.

Q. In relation to that rudder, Captain, it is true, is it not, that at the lowest point to which the water was re-

duced in drydock, after the first stranding, she was im-
[fol. 172] mersed considerably more than 2 feet, if she was immersed up to that rudder arm, as you have testified she was?

A. Well, on that scale it looks like 3 feet, but I can't tell exactly, I didn't think about it before, you know, and so——

Q. After the ship came in the drydock, after the second stranding, it is true, is it not, that there was no damage to the ship at the after end, except the rudder damage?

A. Yes.

Q. At the time that these men were examining the rudder in drydock, after the first stranding, what sort of a day was it?

A. It was a clear day.

Q. How about your temperature on February 9th, in Bremen?

A. It wasn't so very cold.

Q. It wasn't?

A. No.

Q. How cold?

A. Well, I can't tell how much it was.

Q. You might examine your logbook and see.

A. (Referring to log.) We have, on the 6th, 3 degrees Centigrade—3 and 2.

Mr. Haight: What is that in Fahrenheit?

Q. That means 35 degrees Fahrenheit and 34 degrees Fahrenheit, does it not?

A. That is 36 degrees Fahrenheit.

Q. These men, as I understand it, or at least one of them, put his arm in the water up to his shoulder blade, I gather, from the movements you made?

A. Well, nearly so far.

Q. What did he do to his coat?

A. He took his coat off.

Q. Took his coat off and rolled the shirt sleeve up, put his arm up to the shoulder in this water in the dock?

A. Yes.

Q. You told us that your boss—I think was the expression you used?

A. Yes.

[fol. 173] Q. (Continuing:) Told you he had fixed up about the seaworthy certificate?

A. Yes.

Q. Captain Julicker had not been down on your ship at all, had he?

A. No.

Q. Didn't it strike you as somewhat peculiar, that a man was going to issue a seaworthy certificate for the ship, a ship he had never seen after this accident?

A. Well, that is different. If my boss would tell me he is going to fix it up, I think I can believe him.

Q. You didn't care how he fixed it up?

A. Well, how he can fix it up only one way.

Mr. Haight: I ask Mr. Longley by "fix-up" if he means bribery or improperly arranged for?

Mr. Longley: I only mean to secure.

Q. You didn't care how he secured it—he just told you he was going to secure it?

A. Yes.

Q. But it did not strike you as at all peculiar, that a seaworthy certificate for your ship was to be secured from a man who had not examined the ship?

A. Yes.

Q. You don't mean yes, do you—I assume you mean no? Did it or did it not seem peculiar to you—do you know what peculiar means—unusual?

Mr. Haight: Did you think it strange that the Lloyd's surveyor didn't come from Hamburg to Bremen?

The Witness: No, there was one in Bremen, the man we are talking about is in Bremen.

Q. Captain Julicker's headquarters are in Bremen, aren't they?

A. Yes.

Q. Didn't you understand he was coming down the next morning to examine that ship?

A. No.

[fol. 174] Q. That wasn't told you?

A. No.

Q. What was the reason for your going out that night so hurriedly, if it was hurriedly?

A. Well, I didn't see any reason to wait any longer.

Q. Of course, there are two tides a day at Bremen as there are everywhere else?

A. Why should I stay any longer if my boss tells me he is going to arrange everything, if it was everything in good order except the seaworthy certificate, and he said—he told me he is going to arrange that with Mr. Julicker.

Q. You don't suggest, do you Captain, that the visibility is better at night than in the daytime—you know what visibility is, of course?

A. Yes—well, the lights are there at night, I could see all the lights in clear weather; and sometimes in the daytime—well, I was over to the Bay today, you couldn't see the other side, you can't see anything in the daytime like that, but at night——

Q. I don't quite understand you—do you claim then—is it your present position that visibility is better at night than in the daytime for the navigation of your ship?

A. Yes, in clear weather.

Q. The visibility is better at night than in the daytime?

A. Yes—by the lights.

Q. I am not talking about what it is by, I am speaking generally.

A. Well, I don't care for any other visibility except the lights—the lights we knew.

Q. So in sailing from Bremen down this winding river that you have testified to, you would prefer, as a matter of visibility, to sail at night rather than in the daytime, would you?

A. Well, I won't say—right in this track here, in the daytime is just as good—

Q. As a matter of fact, you know it isn't just as good, [fol. 175] don't you, Captain?

A. But further down there we have the range lights forward and aft, and that is better in the nighttime, in clear weather than in the day.

Q. How is that?

A. Well, we can't see the lights in the daytime, and they have small houses and some big ones.

Q. Aren't there any landmarks in daytime?

A. Only the lighthouses.

Q. Then do ships, as you understand it, make a custom to come up this ship channel in the nighttime, as a preference, because they can see landmarks better?

A. They can see them better at night, in clear weather I mean.

Q. There was no reason, was there, why you could not have waited and gone down at the low tide at 1 o'clock the next afternoon?

A. Well, I think it was not so good, because we would arrive near Brake in the darkness again.

Q. Then what?

A. Well then, we would have to tie up on that wharf there.

Q. But you have told us you prefer to navigate in the darkness?

A. Yes, along the river, but tying up there.

Q. What is the difficulty of tying up in the darkness, as you prefer navigation in the darkness?

A. This is different, tying up, that is make the ship fast to some docks at night, that is more difficult at night than in the daytime.

Q. Well, in any event, that is your preference. Now, I don't think I touched on this—perhaps I did—it is your explanation, as I understand it, of this whole disaster—referring to the second stranding—that while your ship was in perfectly good condition to maneuver, by reason of the tugs, etc., she stranded solely as a result of the negligence of the pilot?

A. Yes.

Q. The pilot who is now dead?

A. Yes.

[fol. 176] IN UNITED STATES DISTRICT COURT

Depositions Taken at Hamburg

[Title omitted]

Hamburg, Germany,
Thursday, August 14th, 1930.

Appearances for the Libellant: T. Catesby Jones, Esq.
Appearances for the Respondent: John W. Griffith, Esq.

(From the Shorthand Notes of James Towell & Sons, 33, Chancery Lane, London, W. C. (2.))

First Day

Stipulation as to Testimony

It is stipulated and agreed that the testimony about to be taken may be taken in shorthand and transcribed on the typewriter, the signing, filing and certification waived, two copies of the depositions to be furnished to Counsel for the Libellant, stenographic fees to be payable in the first instance by the Respondent and to be taxable as costs.

[fol. 177] It is further agreed that the testimony about to be taken may be read in evidence in the above entitled cause and also in the other causes pending in the United States District Court for the Southern District of New York growing out of the same accident, and also may be read in evidence in the similar causes now pending in the United States District Court at San Francisco, California.

It is further agreed that the oaths of the witnesses be waived.

Objections to Evidence

1 Mr. Jones: With respect to any opinion, evidence or admission of German cargo underwriters as to whether or not it would be safe or necessary to tow a vessel with a badly damaged rudder, I object to such evidence on the following grounds:

(1) That it would be a statement of opinion by a third party who is not connected with the Libellant or authorised to represent them or whose statement or opinion would be not to any extent binding on them.

(2) Any statement or opinion by German cargo underwriters is obviously not admissible as an admission, or contradictory statement by British or American cargo underwriters or their assured.

(3) That such evidence is hearsay.

(4) That such evidence is irrevelant and immaterial.

(5) That the German underwriter has not been qualified as an expert Master Mariner to express such an opinion.

(6) That it is incompetent as fact testimony, because the [fol. 178] German underwriters did not personally observe the condition of the vessel, and

(7) That it is not admissible on the theory that a person who is not an expert has to follow the advice of an expert.

The person seeking advice from the underwriter was the shipowner who was himself contracting as expert skilled ship operator with the Libellant.

It is further agreed that the foregoing objection shall be deemed applicable, without the necessity of repetition, to oral testimony which may be offered of the character above described.

Mr. William Eggars, Sworn State interpreter, was present to interpret any questions or answers which might desire interpretation.

HUGO BRANDT, called as a witness on behalf of the Repondent, testifies as follows:

Direct examination.

By Mr. Griffin:

2 Q. Where do you reside?
A. In Hamburg.
3 Q. And what is your profession?
A. Director of the Nord Deutsche Insurance Company.
4 Q. You are an underwriter?
A. Yes.
5 Q. How long have you held that position?
A. For ten years.
6 Q. How long have you been a Marine Underwriter?
[fol. 179] A. Ten years, and all the time I have been here in Hamburg.
7 Q. Is your Company also a member of the Verein Hamburger Assecuradeure?
A. Yes.
8 Q. For how long a time?
A. For a long time; ever since the Association has existed.
9 Q. Will you tell us what that Association is, and a little of its history?
A. It is an Association of Hamburg Underwriters. Years and years ago at the beginning of the Association, it was only an Association for the settling of claims and salvage cases, and so on, and it was called the Haverie Beureau. After that it became the Association of Under-

writers not only for the settling of claims and salvages, and so forth, but also for other interests of underwriters—quotations and other interests.

10 Q. Is there a Committee of the Association known as the Average Committee?

A. Yes.

11 Q. And did that also exist in 1928?

A. Yes.

12 Q. Are you a member of that Committee?

A. Yes.

13 Q. And were you so in 1928?

A. Yes. I can give you the Regulations of this Association.

14 Q. I will ask a question to which you can give that as an answer. What is the function of the Average Committee?

A. The function of the Average Committee is the handling of the claims in these cases and also about matters to be instituted if there is an accident, and all the members of the Association are bound to bring these cases, if they are concerned as underwriters, through the Special Committee of the Association in order that this Committee should handle the case. It is obligatory on all the members, as soon as two members are concerned in a case, and that [fol. 180] is described in these paragraphs of the Statute or Regulations here.

15 Q. Will you translate the paragraphs into English?

A. I am reading from the Regulations of the Association——

16 Q. Were those Regulations also in force in the year 1928?

A. Yes.

17 Q. Now will you read the paragraphs to which you have referred?

A. Paragraph 34 says: "All cases of average, which need joint measures and in which more than two members of the Association are interested as direct underwriters, are to be submitted to direction and handling by the Association." Then there is Paragraph 35 which says: "This handling mentioned in the foregoing Paragraph 34, cases of average, is carried out through the Average Committee which has to be appointed by a Special Committee." That says that this Average Committee is entitled to direct and

to handle all these cases and through the decisions of this Committee the members of the Association are bound. All these cases are submitted to the direction of the handling through the Association and they are subrogated to this Committee.

18 Q. Do you remember the case of the "Isis" which we are now discussing?

A. Yes, I remember it quite well.

19 Q. Are you able to say whether the Average Committee was consulted with regard to the towage of that vessel?

A. Yes, it was consulted.

20 Q. Can you state in brief what facts were laid before the Committee for its opinion?

A. It was an accident to the "Isis" on the Weser. The "Isis" grounded and there was something in disorder with the rudder, and after that she went to Bremen and we were asked whether there was any objection to be raised or whether we would consent to the "Isis" being towed to Ham- [fol. 181] burg with the assistance of two tugs on condition that the rudder was fixed amidships, and we agreed to that. I am absolutely sure about that because there is a letter on the files showing that the Hamburg-America Line asked us, and that the Secretary of the Association, after consulting the members of the Committee, answered the Hamburg-America Line that we consented to the towage with two tugs.

21 Q. Who was the Secretary at that time?

A. Mr. Dahlstrom.

22 Q. Was that decision under the Rules of the Association binding upon the members of the Association?

A. Yes, binding according to the paragraph I have cited.

23 Q. Are you able to state if the various underwriters who were members of the Association were interested as hull and cargo underwriters in the "Isis" at that time?

A. Yes.

24 Q. Your own among others?

A. Yes.

25 Q. Was the decision of the Association in fact accepted by the members of the Association?

A. Yes. It was accepted by the members of the Committee and by that means it was accepted by the members of the Association. The members of the Association are not asked again. If the Committee decides the question,

then it just informs the members in important cases, but it is not bound to inform all the members.

26 Q. In fact have the German underwriters on the cargo and hull, who were members of the Association, accepted the general average which we are discussing?

A. Yes.

27 Q. In your experience have you known of many cases in which the Association has passed upon such questions and in which English and American underwriters have also been interested?

[fol. 182] A. English and American underwriters have accepted it or have not objected to it.

28 Mr. Jones: All of this, of course, is subject to my objection.

29 Mr. Griffin: Quite.

30 Q. In the past will you state whether such English and American underwriters have always accepted the decision of the Association as to such questions?

31 Mr. Jones: I have one further objection on the ground that no custom has been pleaded, nor has any such custom been called to the attention of the Libellant in any of the correspondence between the parties.

32 The Witness: They did not object to it as they are not asked. We arrive at our decision and we presume that they will follow us without mentioning anything at all.

33 Mr. Griffin: In the past have they followed you?

A. Yes. This is the first case where English and American or other underwriters have not followed the decision of the Hamburg Average Committee, as far as I know in my experience.

34 Q. And your experience covers the past ten years?

A. Yes.

35 Q. Is there an organization in England which is similar in its functions to this Association?

A. Yes, there is an Institute of London Underwriters, but I do not think it has the same function with regard to accidents and salvage cases as the Salvage Association.

[fol. 183] 36 Q. I meant the Salvage Association.

A. The Institute is concerned with conditions.

37 Q. But the Salvage Association of London has the same functions?

A. Yes, nearly the same functions as far as I know.

Cross-examination.

By Mr. Jones:

38 Q. You do not suggest that any of the British or American underwriters who are Libellants in this suit were members of the Hamburg Underwriters Association, do you?

A. These underwriters are not members. But some of them—I do not know which Companies are concerned on the American side—are represented here by agents. If an agent is bound by the decision of the Committee, it relates only to the insurance written by the agent for the foreign Company.

39 Q. You mean, that in order to bind the agent, the insurance must be written in Hamburg by this agent?

A. Yes.

40 Q. And the decision of the Committee has no application whatever to insurance written elsewhere than in Hamburg?

A. It has not the binding character which it has on the members of the Association because these other Companies do not belong to the Association.

41 Q. Is it not the fact that it has no binding effect whatever with respect to insurance written elsewhere than in Hamburg?

A. It has no binding effect legally, no. But the custom has been, as I have mentioned.

42 Q. Why was the Average Committee consulted with reference to the accident concerning the "Isis"?

A. The Committee is always consulted in such a case. According to the law here the shipowner is not obliged [fol. 184] to ask the underwriters; but it is absolutely the custom and practice in such a case for the underwriters and this Committee, first of all, to be asked about the measures and whether they have anything to say, and to give some advice.

43 Q. This situation which was presented by the accident to the "Isis" was in some respects an unusual situation—unusual in the sense that it was not ordinary ship

operation. As I take it, in those cases it is the custom and practice in Germany to consult underwriters on cargo and hull as to what is the best course to be pursued.

A. It is the custom here in Hamburg to ask this Committee of the Association.

44 Q. Is it not the fact also that your Committee was consulted by the head office of the Hamburg-America Line in Hamburg?

A. Yes, by the man who has to do the work in this branch —by what we call, in the Hamburg-America Line, the insurance branch. They have a special branch here and they have to ask questions and have connection with the underwriters. It is not one of the leading Directors of the Hamburg-America Line, but it is another man. It is Mr. Stalte or Mr. Warns, who have to do it.

45 Q. They are in charge of that work for the Hamburg-America Line?

A. Yes.

46 Q. And their decision is a decision of the Company?

A. No, I do not think that. But if there is a question to be raised and if there is something to speak to the underwriters about this department is representative of the Hamburg-America Line.

47 Q. Quite so.

A. But the decision about a case and what to do is a technical question.

48 Q. Is it not a fact that the decision to proceed to Hamburg from Bremen without repairs being made at Bremen [fol. 185] was made by the head office in Hamburg and not by the Captain?

A. Yes, by the head office, not by the Captain.

49 Q. There are shipyards in Bremen fully capable of repairing such damage as the "Isis" sustained, are there not?

A. Yes.

50 Q. Fully capable of doing it?

A. Yes; it could have been done in Bremen.

51 Q. And the decision to proceed, without repairs at Bremen, was solely for the shipowner's benefit and convenience?

52 Mr. Griffin: I object to that as not being within the witness's knowledge.

53 Mr. Jones: If you do not know, then say "I do not know."

54 Mr. Griffin: And it also does not take into account the cost of discharging, stowing and reloading and general average expenses which would have fallen on the cargo.

55 Mr. Jones: Can you answer the question? If you do not know, say "I do not know."

A. It is not only for the benefit of the shipowner, but for all interests concerned, for the cargo as well, because if it had been necessary to discharge the cargo, quite a lot of expenses would have been incurred.

56 Q. Did you know at the time you gave your decision that the rudder of the "Isis" at the time she left Bremen to proceed to Hamburg would incline her to steer to starboard?

A. No, when she left Bremen?

57 Q. Yes.

A. No. But we knew that there was the twist in the rudder-stem.

[fol. 186] 58 Q. Yet you did not know that that would incline her to steer to starboard?

A. No.

59 Q. I understood you to say that the agreement of the Hamburg underwriters was without authorization from any of the American or British underwriters.

A. Yes.

60 Q. Did the approval of the Hamburg underwriters cover a night passage?

A. Yes.

61 Q. Is it not a fact that the Hamburg underwriters on cargo insured only a very small proportion of the cargo of the "Isis"?

A. I cannot answer this question exactly; but we can find out how much insurance interest was on this side.

62 Q. I have an average adjustment here and perhaps you would be good enough to look it over and tell me how much of the insurance was Hamburg. (Same handed to witness.)

63 Mr. Griffin: Could we not do that ourselves and save time?

64 The Witness: It would be very difficult for me to do.

65 Mr. Jones: Yes, it would be difficult for you, but from my examination, it would seen only a very small proportion was in Hamburg.

66 Mr. Griffin: I am sure we could agree on that.

67 The Witness: There are some 130 odd pages. But glancing through, I see two or three pages which are German.

68 Mr. Jones: If you do not know, we can check it.

A. I do not know the amounts, but quite a lot of the items here are insured with the German Companies.

69 Q. You cannot go altogether by that, because the name of the settling agent is put there and not the name of the [fol. 187] agent who effected the insurance; that is not a fair guide.

A. No. There seem to be quite a lot of German interests.

70 Mr. Jones: Ye can determine that between ourselves.

71 Mr. Griffin: Yes.

72 Mr. Jones: We will check that up and get it accurately; it is not fair to ask you that question. The water in the Weser river is shallow, is it not?

A. That is rather a technical question.

73 Q. You do not feel competent to answer that?

A. No. But ships of the size of the "Isis" pass the Weser without any difficulty.

74 Q. That is, provided they are in perfect condition and steer properly?

A. Yes; but stranding can happen anywhere.

75 Q. The Weser river has a winding channel.

A. It depends how the river goes.

76 Q. The river is a bending river?

A. Yes.

77 Q. Did you understand that a certificate of seaworthiness had been granted before the time you gave your approval?

A. No, there was not a seaworthy certificate granted at that time.

78 Q. But you understood that they would obtain one.

A. Yes.

79 Q. Do you know whether a seaworthy certificate was obtained?

A. A seaworthy certificate was given by word, as far as I know. The Hamburg-America Line approached Mr. Julicher, the expert of the Germanischer-Lloyd, because he is the man to give a seaworthy certificate, and the further proposition was to send the "Isis" with two tugs only, and [fol. 188] in a conference with Mr. Julicher, as far as I know, they decided to give her three tugs.

80 Q. I understood that Mr. Julicher never actually saw the ship himself; is that correct?

A. Yes; I am under the impression that he did not see her. There was a conference and he said: "If the rudder is fixed in the middle of the ship there is no objection to be raised against towing her with three tugs."

81 Q. Is it not a fact that on the day Mr. Julicher was consulted, Mr. Julicher stated that the next day he would be prepared to give a certificate and that the ship left early in the morning before Mr. Julicher had an opportunity to see the ship or give a certificate?

A. But he knew that she ("Isis") had to leave.

82 Mr. Jones: I want to strike out the answer as being unresponsive, and to ask Mr. Brandt to answer the question.

83 The Witness: Please repeat the question once again.

84 Mr. Jones: Is it not a fact that on the day Mr. Julicher was consulted, Mr. Julicher stated that the next day he would be prepared to give a certificate, and that the ship left early in the morning before Mr. Julicher had an opportunity to see the ship or to give a certificate?

A. That is right as far as I know.

85 Q. I understood you to say that your Company was interested in the hull insurance principally.

A. In the hull and cargo, too.

86 Q. To what extent were you interested in the hull insurance?

A. I cannot say.

[fol. 189] 87 Q. Were you interested more in the hull insurance than in the cargo?

A. I suppose more in the hull.

88 Q. I suppose the Hamburg underwriters were generally more interested in the hull than in the cargo?

A. Do you mean with regard to the "Isis"?

89 Q. Yes.

A. It depends whether the "Isis" is coming in or going out. If the "Isis" is going out, we would have more on the cargo.

90 Q. But if she is coming in, you would be more interested in the hull?

A. Generally it must be more in the hull than the cargo; but I do not know whether it was so in this case, without seeing the figures.

91 Q. All the hull interest was in Hamburg?

A. Not all of it.

92 Q. How much percentage of the hull was in Hamburg?

A. That I cannot say; there was quite a lot reinsurance.

93 Q. Leave out the reinsurance for the moment and take direct insurance. Was that not all in Hamburg?

A. No.

94 Q. What percentage of it?

A. I cannot tell you.

95 Q. Would you say it was less than 50 per cent.?

A. I cannot tell you.

96 Q. Have you the figures?

A. Yes, I can give you the figures, but I would not be prepared to answer that question.

97 Q. Can you get that over the telephone today?

A. I cannot get it to-day, but I will look through all the papers.

98 Mr. Griffin: Would it be satisfactory if he sent it to me in a letter?

99 Mr. Jones: Yes, that will do.

100 Mr. Griffin: Then will you supply me with the in- [fol. 190] formation in a letter, Mr. Brandt?

A. Yes.

(The witness withdrew.)

101 Mr. Jones: It is understood, of course, that my cross examination is made, without waiving any of the objections.

102 Mr. Griffin: Quite.

OSCAR DAHLSTROM, called as a witness on behalf of the Respondent; testifies as follows:

Direct examination.

By Mr. Griffin:

103 Q. What is your full name?

A. Oscar Dahlstrom.

104 Q. What are you?

A. I am the Secretary of the Association of Hamburg Underwriters.

105 Q. How long have you held that position?

A. I have been with the firm for six years only. But before that I was in the direction of the Hamburg Insurance Company.

106 Q. Do you remember the case of the "Isis" which we are discussing?

A. Yes.

107 Q. Did you have communication with the Insurance Department of the Hamburg-America Line about that?

A. Yes.

108 Q. Was it first over the telephone?

A. I was rung up on the telephone by Mr. Warns of the Hamburg-America Line.

109 Q. Will you state what the conversation with him was over the telephone on that occasion?

A. Mr. Warns told me that the "Isis" when coming up the River Weser, touched the ground and arrived at Bremen, that she could not steer quite correctly but that [fol. 191] the engines were quite in order and that the Hamburg-America Line intended to lift the after-part of the "Isis" in a dock and to fix the rudder in such a way that it would be impossible to move it, and that after fixing it the steamer would be towed to Hamburg and Antwerp, thus avoiding the entire docking of the ship which would have made necessary complete discharge and re-loading of the cargo which would, of course, have been a very expensive measure.

110 Q. You said "towed to Hamburg and Antwerp." Was it to Antwerp, too, or only to Hamburg?

A. No; first, of course, it was only to Hamburg and not to Antwerp. But as far as I remember, that was the idea,

because part of the cargo on board was for Hamburg and another part was for Antwerp.

111 Q. What did Mr. Warns ask you to do, if anything?

A. Mr. Warns asked me if the Hamburg Underwriters Association had any objection to the Hamburg-America Line acting in this way.

112 Q. What did you tell him?

A. I answered that I had no authority to deal with this queston but that I should speak about the subject to the Special Committee which we have in our Association.

113 Q. Of which you are the Secretary?

A. Yes.

114 Q. Is that the Average Committee?

A. Yes, that is the Average Committee.

115 Q. Did you speak to the members of the Average Committee about it?

A. Yes.

116 Q. To all of them?

A. This Special Committee meets at the Exchange every day, and I spoke to this Committee on the same day, I think —I am not quite sure whether it was in the evening; no, it must have been in the forenoon.

117 Q. Do you remember what the date was?

A. I cannot remember; but I can tell from my papers [fol. 192] that it must have been the 9th February, 1928.

118 Q. Did you speak to all the members of the Committee?

A. Yes.

119 Q. What was their decision?

A. Their decision was that we should agree to this measure.

120 Q. Did you so inform Mr. Warns?

A. Yes, I informed Mr. Warns accordingly.

121 Q. On that day did you receive a letter from Mr. Warns, of which I will show you a copy, dated the 9th February, enclosing a report, a copy of which is also attached? (Same handed to witness.)

A. Yes.

122 Q. On what date did you receive that letter?

A. It might be that we got it on the same evening.

123 Q. Could you tell from your files?

A. Yes. (After consulting files): Yes, it must have been the same evening, because of the stamp.

124 Q. Does the stamp to which you refer, indicate the date when it was received by you?

A. Yes; every letter coming into our office is stamped.

125 Q. And that gives the date of the receipt?

A. Yes.

126 Q. And in this case it was the 9th February, 1928?

A. Yes.

127 Mr. Griffin: I offer the copy of the letter in question produced. It is marked "Respondent's Exhibit 1." I also offer the report enclosed with it, which is marked "Respondent's Exhibit 1A."

128 Mr. Jones: I object to the offer as being self-serving declarations and not being binding on any of the Libellants.

(The letter was marked "Respondent's Exhibit 1.") [fol. 193] (The report was marked "Respondent's Exhibit 1A.")

129 Mr. Griffin: Did your Committee subsequently issue a written declaration on the subject?

A. Yes.

130 Q. Is this it? (Same handed to witness.)

A. Yes, that is my signature.

131 Q. Whose are the other signatures?

A. This is Mr. Schues.

132 Q. Is he the President of the Association?

A. Yes, and this is the signature of Mr. Gaede, who was the Vice-President of the Association at the time.

133 Q. Was there an amendment or modification made in this afterwards?

A. Yes.

134 Q. Have you a copy of the final one with you?

A. Yes.

135 Q. Could you show it to us?

A. Here it is. (Same handed.)

136 Q. In what respect did the two differ?

A. In the original certificate we speak about the hull underwriters, and in the amended one we speak also for the interests of the cargo underwriters as far as the interests are insured with the members of our Association.

137 Q. Would you be good enough to write at the bottom of this original one the words which were added, indicating at what point they were added?

A. Yes.

138 Mr. Jones: Yes, and the date when they were added.

A. Certainly. Shall I do it in German?

119 Mr. Griffin: Yes, the sentence is quite different and that makes it difficult.

[fol. 194] 140 Mr. Jones: Why not have both documents?

141 Mr. Griffin: Could you let us have your copy for the purpose of making a copy, and then we will return it to you?

A. Yes.

142 Mr. Griffin: The amended declaration is offered in evidence and is marked "Respondent's Exhibit 3."

143 Mr. Jones: I object to the offer of the amended declaration on two grounds, first, that the original declaration has not been offered, and secondly, because the Libellants are not parties in any way to either declaration and that it has no binding effect with respect to them.

(The Respondent's Declaration was marked "Exhibit 3.")

144 Mr. Griffin: I also offer in evidence the original declaration to be marked "Exhibit 4."

145 Mr. Jones: I object on the ground that the original declaration does not purport to bind the cargo underwriters whether in Germany or elsewhere, and on the further ground that it has no binding effect whatever with respect to any of the Libellants.

(The original Declaration was marked "Respondent's Exhibit 4.")

146 Mr. Griffin: Has it been usual, in your experience, since you have been the Secretary of the Average Committee, for questions such as this to be submitted to the Committee by shipowners?

A. Yes, always.

[fol. 195] Cross-examination.

By Mr. Jones:

147 Q. Mr. Warns of the Hamburg-America Line, is in the Hamburg-America Line at Hamburg, is he not?

A. Yes.

148 Q. And he is in charge of all such questions for the Hamburg-America Line?

A. Yes; he is one of the Managers in the Insurance Department of the Hamburg-America Line.

149 Q. The ship could have been docked at Bremen, could she not?

A. Yes, she could have been docked there.

150 Q. I observe from Exhibit 4 that the date of the paper is the 3rd July, 1928, and I ask you whether or not any written approval had been given of what was to have been done in February 1928 at any prior date?

A. Whether we have given any written approval to the Hamburg-America Line?

151 Q. Yes.

A. No, we have only received this letter from the Hamburg-America Line, which confirms the conversation; it is stated in that letter: "As agreed upon with Mr. Dahlstrom", and that is me. (Referring to Exhibit 1.)

152 Q. Am I correct in saying that as late as the 3rd July, 1928 no approval had been granted on behalf of the cargo underwriters?

153 Mr. Griffin: I object to the question, as the witness has testified that approval was given by word of mouth at the time.

154 Mr. Jones: Will you answer the question?

A. I do not understand the question. On the 9th of February we gave the approval in the name of our Average Committee, and this Committee was also entitled to speak on behalf of the cargo underwriters, so far as the cargo [fol. 196] was insured with members of our Association.

155 Q. Why was it that, in the paper of the 3rd July, 1928, which is Exhibit 4, you stated that the voyage of the "Isis" from Bremen with fixed rudder was approved by the insurers of the hull and that these latter did not object to such trip?

A. I beg your pardon, but I cannot understand. Do you ask me why it was corrected?

156 Q. Why was the statement made in that paper?

A. It was made in consequence of the Hamburg-America Line having received this telegram. The Hamburg-America Line had received a telegram from San Francisco, and we were asked by the Hamburg-America Line to confirm

the agreement come to in February, 1928, and we simply repeated the agreement.

157 Q. Why was nothing said in that paper with respect to the cargo underwriters?

A. Perhaps that was a mistake on our part. It has always been the general rule, if I may repeat it once more, that our Average Committee, in general Average cases, is authorized to speak as well for the hull underwriters as for those cargo underwriters who have interests in the cargo in the respective ships. Why it was omitted to say that in this first declaration was simply a mistake, perhaps made by myself, I did not think of the cargo at that moment, and perhaps the Hamburg-America Line might have told me, "Why did you not speak about the cargo as well?", and so we changed it afterwards.

158 Q. As a matter of fact your Association was more interested in the hull than it was in the cargo?

[fol. 197] A. No. As far as I am informed there were big cargo interests as well.

159 Q. Will you give me a translation of the second document, which is Exhibit 3?

A. "We herewith declare that the voyage of the M. S. "Isis" from Bremen with fixed rudder has been approved by the Average Committee of our Association who have to deal with this case for the hull underwriters as well as for those members who have insurance interests in the cargo and that no objection was subsisting against this voyage all the more as the Germanischer-Lloyd (that is the classification) had approved this voyage and that the ship has been found seaworthy for the voyage to Hamburg".

160 Q. Thank you for translating it, it being understood that the translation is for my convenience and not as evidence. Are you under the impression that the surveyor for the Germanischer-Lloyd had actually seen the ship before you gave your approval?

A. No. You cannot expect me, after two or three years, to remember all the details. It may be that the Hamburg-America Line told me something to that effect. Of course, the Hamburg-America Line must have told us that the Germanischer-Lloyd approved this voyage, but whether the Germanischer-Lloyd had seen the ship I do not know.

161 Q. You knew that the approval of the Germanischer-Lloyd expert as to the voyage would be of no value unless he had actually seen the ship?

A. But we have not dealt with that question at all.

162 Q. That is what I am trying to develop. As a matter of fact it appears quite clearly from the letter you have been good enough to translate for me, that you gave your approval on the assumption that the Germanischer-Lloyd [fol. 198] surveyor had approved the towage?

A. Quite so.

163 Q. And you know that the approval of a Germanischer-Lloyd surveyor would be valueless unless he had actually seen the ship?

164 Mr. Griffin: I object to the question.

165 Mr. Jones: Will you answer the question?

A. I am not expert enough to give an opinion about that.

166 Q. Do you mean to suggest that your Committee would pay the slightest attention to the approval of a surveyor who had never seen the ship?

A. I do not know whether we dealt with that question in detail.

167 Q. Is it customary in Hamburg for your Committee to take the approval of a surveyor as to the condition of a ship when the surveyor has not seen the ship?

A. As a rule, if an accident occurs to a ship it is for the shipowner to get the seaworthy certificate, and how he does it is for him to decide.

168 Q. Would you pay the slightest attention to a seaworthy certificate obtained from a person who had never seen the ship?

A. I told you before that I am not an expert; I am the Secretary.

169 Q. As a merchant and as an expert, if you obtained a certificate from an individual as to a fact, you expect that that individual would have first-hand information as to such fact. Is that not true?

A. I do not know whether any certificate was issued in this case.

170 Q. But you did give your approval on the condition that such a certificate had been obtained?

[fol. 199] 171 Mr. Griffin: I object.

172 Mr. Jones: What do you say?

A. At the time when the Hamburg-America Line asked for permission, I do not remember whether anything was said about the certificate of the Germanischer-Lloyd.

173 Q. And your Exhibit 3, which you have been good enough to translate, illustrates pretty clearly that you were left under the impression by the Hamburg-America Line that such a certificate had been obtained?

174 Mr. Griffin: I object to that question on the ground that the document does not imply that he merely states that the expert had approved.

175 Mr. Jones: I will put it in a different way.

176 Q. At the time you gave your approval you were told that the expert of the Germanischer-Lloyd had approved the ship for her seaworthiness?

A. It is awfully difficult for me to answer this question, because I do not remember the details of the conversation I had over the telephone. I can only refer to the declaration which we have put here in this letter. (Referring to Exhibit 3.)

177 Q. The declaration contained in Exhibit 3 represents your only recollection on the subject; is that it?

A. Yes.

Redirect examination.

By Mr. Griffin:

178 Q. But you do recollect that you had telephone conversations with Mr. Warns?

A. Yes.

[fol. 200] 179 Q. And that he wrote you a letter, which you produced?

A. Yes.

180 Q. That is all I have to ask you, if you will be good enough to send us a copy of Exhibit 3?

A. Very well.

(The witness withdrew.)

OTTO REICHENBÄCHER, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

181 Q. What is your occupation, Mr. Reichenbächer?
A. Marine Superintendent.
182 Q. For whom?
A. For the Hamburg-America Line.
183 Q. How long have you been Marine Superintendent?
A. Since 1924.
184 Q. In a general way, what are your duties as Marine Superintendent?
A. I was Nautical Inspector for the Nautical department and had all these accidents for ships, for the Hamburg-America Line.
185 Q. During what time were you Nautical Inspector?
A. Since 1905.
186 Q. During that time your duties were what?
A. To settle all nautical affairs.
187 Q. Since 1924, when you have been Marine Superintendent, what duties have you had?
A. I have had to repair the ships and to attend to the upkeep of the ships and the drydocking of the ships.
188 Q. Does that include making arrangements for the towing of the ships when necessary?
A. Yes.
[fol. 201] 189 Q. Before 1905 were you at sea?
A. Yes.
190 Q. For how long?
A. For 20 years.
191 Q. Were you First Officer?
A. Yes, and for two years I was captain. I started in 1894 with the Hamburg-America Line and before that I was in sailing ships for six years.
192 Q. Of what vessels were you Master?
A. The "Croatia" and the "Hamburg".
193 Q. What sort of vessel is the "Hamburg"?
A. A big passenger boat, about 10,000 tons.
194 Q. Running on the Hamburg-America Line to New York?

A. Yes: and I made with her a trip with the German Emperor in the Mediterranean.

195 Q. Do you remember the case of the "Isis"?

A. Yes.

196 Q. I believe she first went aground as she was coming up the River Weser to Bremen?

A. Yes, she came from the West Coast.

197 Q. Did you see her after her arrival at Bremen?

A. Yes, I went over to Bremen and spoke to the captain about what happened.

198 Q. Do you remember on what date you saw her in Bremen?

A. I cannot say exactly the day, but I think it was the 9th of February, 1928.

199 Q. What was wrong with the ship at that time?

A. We did not know exactly because the ship was deep loaded: the tanks and bilges and everything were dry and the ship did not make any water, and the engines were in good order, and Captain Kruger, the commanding officer of the ship told me——

200 Mr. Jones: I object.

A. —that there must be something wrong with the rud-
[fol. 202] der because the ship always went to the starboard side.

201 Mr. Griffin: Was some cargo discharged from the ship at Bremen?

A. They were discharging the cargo when I went there.

202 Q. And when she finished discharging her Bremen cargo, about how much cargo had she left?

A. Only a few hundred tons—only 400 or 500 tons.

203 Q. I do not think you understand me; you mean that 400 or 500 tons was unloaded at Bremen, do you not?

A. Yes.

204 Q. How much cargo was then left in the ship?

A. She was nearly full—about three-quarters full.

205 Q. Was she put in dry dock?

A. Yes; about 4 o'clock we took three or four tugs—I do not remember exactly how many—and put her in dry dock in the Actiengesellschaft Weser.

206 Q. Did you see her in dry dock?

A. Yes.

207 Q. Did you examine her rudder?

A. Yes, I did.

208 Q. In what condition did you find her rudder?

A. The rudder blade was in good order; there was nothing that you could see in the blade. But we could see that the rudder stem was twisted to starboard.

209 Q. And the result of that was that when the rudder was amidships, how was the rudder pointing?

A. When the rudder was amidships then the rudder blade laid hard astarboard—it was nearly a 45° twist.

210 Q. Was the rudder blade itself twisted or bent in any way?

A. No, that was straight and in good order.

[fol. 203] 211 Q. What did you do with the rudder?

A. Then we turned the rudder over on the bridge to hard aport and then we had the rudder blade right in the middle and so we lashed it.

212 Q. How did you lash it?

A. We put a screw on the rudder quadrant——

213 Q. Will you explain how you put the screw on the rudder quadrant?

A. That is an instrument by which, when you are on the high sea, if there is something wrong with the rudder, you can keep it fast. It is like a vice and it is screwed on deck on the quadrant.

214 Q. How many screws are there?

A. One on each side; but they are heavy screws.

215 Q. Were those screwed down?

A. Yes.

216 Q. Did you see that done?

A. Yes, I examined it.

217 Q. What else was done to the rudder?

A. Then we took wire ropes and bent them through holes in the rudder blade aft.

218 Q. Then where did you lead them?

A. We led them on deck by tackles on both sides and heaved them tight with the ship's winches.

219 Q. On what were they made fast?

A. On the bollards.

220 Q. One on each side?

A. Yes.

221 Q. Did you see that work done?

A. Yes, and I examined it, and there was no possibility of moving the rudder in any way; it was as firm as iron.

222 Q. When the rudder was lashed and screwed in the way you have described, how did the rudder blade point—was it to one side or was it straight?

A. It was straight amidships.

223 Q. Who was present when the question of towing the ship was discussed?

A. Inspector Schubert.

[fol. 204] 224 Q. Is he a Hamburg-America Line man?

A. Yes.

225 Q. Who else?

A. Captain Kruger and a dock engineer, Menck, from the Weser Dry Dock.

226 Q. Anyone else?

A. Dock master Wührmann.

227 Q. Is he also from the Weser Dry Dock?

A. Yes, and before that I was talking about towage with Director Mr. Meinicke from the Unter Weser Towage Company.

228 Q. Is he an experienced man?

A. Yes, he is an experienced man—he has been about 20 years in this business.

229 Q. The business of towing on the River Weser.

A. Yes.

230 Q. What did you decide to do with regard to towing the ship?

A. We did not see any risk or any difficulty in towing the ship like it was, with good assistance from three tugs, fastened one forward and two aft, one on each side, to tow her from Bremen to Hamburg. We talked about whether it would be better to do it by night or by day.

231 Q. Did you consult Captain Kruger?

A. Yes.

232 Q. Had he any objection?

A. No; he said there was no risk and no difficulty about it.

233 Q. What were the opinions of Mr. Schubert and Mr. Meinicke and Mr. Wührmann?

A. They were all of the same opinion. Then I said, "But I do not like to send the ship away before we get a seaworthy certificate.

234 Q. Then what did you do?

A. I telephoned from the Dock Master's office to Mr. Julicher, of the Germanischer-Lloyd.

235 Q. About what time was that?

A. That was about 7 o'clock in the evening.

[fol. 205] 236 Q. What did you say to him?

A. I explained the whole thing to him, that the ship was in good order, hull and engines, and I explained to him the damage done to the rudder and what we had had done to the rudder to keep it amidships and fast, and I told him that we had three tugs for assistance, and I asked him if he would like to see the ship in dry dock.

237 Q. Did you tell him where you proposed to tow the ship?

A. Yes.

238 Q. What did he say?

A. He said, "I do not see any difficulty why you should not tow the ship to Hamburg as it is," and he promised me that he would send a seaworthy certificate to Hamburg because it would be too late for him, as he was in a hurry to leave his office, to send it tonight, on board ship.

239 Q. Did you speak to anyone else on the telephone?

A. After I finished with Mr. Julicher we called up the Commander of the pilots.

240 Q. What is his name?

A. I do not remember.

241 Q. I will see if I can find it.

A. We called him up and explained to him the same things as I did to Mr. Julicher, and asked him what the best time would be to leave Bremen with the "Isis." I said, "I think it would be better to leave in day time," but he said, "No, we have a very good tide and it is moonlight, and I would prefer to send the ship at 1 o'clock in the morning of the next day." I asked him to get a good pilot, and he said, "I will give you the same who brought the ship up to Bremen."

242 Q. What is his name?

A. Siedenburg.

243 Q. He is not living now, is he?

A. No, he is dead.

[fol. 206] 244 Q. Was he an experienced pilot?

A. Yes, he was a very experienced pilot. The Commander said he knew the ship and he knew what had happened to the ship, and he said, "I think he is the best man for this purpose," so I said, "All right."

245 Q. Did he say anything about the traffic on the river by night and by day?

A. Yes; he said to me, "It is better to make this towage at night time"——

246 Mr. Jones: I object to this as hearsay.

A. —"because there is not so much traffic on the River Weser."

247 Mr. Griffin: You spoke a few moments ago about Mr. Meineicke. When was it you talked with him?

A. I think it was in the afternoon before the ship went into dock.

248 Q. What was that conversation?

A. I asked him if he had strong tugs enough to tow the ship over to Hamburg, and I told him that we would not spare any tugs—that he should send as many as possible—and he said, "I will send you three tugs which are the strongest tugs we have and they will do it. But if the captain or pilot want more we can send other tugs."

249 Q. Did you tell that to the captain?

A. Yes, I told the captain that. I said to him, "If you or the pilot want more tug boats I leave it to you; you can order as many as you like."

250 Q. How large a ship is the "Isis"?

A. About 5,000 tons gross.

251 Q. Has she twin screws?

A. Yes, she is a twin screw motor vessel.

[fol. 207] 252 Q. Do you know what her horse power is?

A. About 2,400.

253 Q. What were the tugs which were engaged?

A. They had the biggest tugboat on the Weser, that is the "Hoheweg".

254 Q. What is her horse power?

A. Between 1,000 and 1,100 horse power—about 1,080 horse power.

255 Q. Was she one of the tugs?

A. Yes.

256 Q. What were the other two?

A. The other two were the "Eversand", about 800 horse power, and the third one was the "Lankenau", which is about 800 horse power. So we had altogether about 2,600 horse power additional to the ship's own engines.

257 Q. What was the ship's draught?

A. Forward 18 ft. 5 ins. and aft 23 ft. 5 ins.

258 Q. Was that a proper trim?

A. Yes.

259 Q. You spoke of the Germanischer-Lloyd. Is that a classification society?

A. Yes, like the British Lloyds.

260 Q. Is that the Association to which you usually apply for seaworthy certificates in such cases?

A. Yes.

261 Q. You say that the commander of the pilots said that there was going to be a good tide?

A. Yes.

262 Q. Was that a tide going down the river or up the river?

A. Going up the river—a flood tide.

263 Q. Was a flood tide a desirable thing?

A. Yes.

264 Q. Why?

A. Because it is always better to have the tide against you.

265 Q. Why is that?

A. Because you can keep her more steady than if you have the tide with you.

266 Q. And if you want to stop the ship, what then?

[fol. 208] A. It is better that you should have the tide against you.

267 Q. As I understand you, the ship was in good condition throughout except the rudder?

A. Yes, in every way; all the auxiliary engines were in good order, the windlasses and the winches and the anchors and everything.

268 Q. Did you tell Mr. Julicher how many tugs you were going to use?

A. Yes, I explained to him how we would manage.

269 Q. As a result of your experience, in your judgment was the ship seaworthy to be towed from Bremen to Hamburg on that occasion, starting at 1 o'clock in the morning, with the tide as you have stated and the three tugs and the use of her twin screws?

270 Mr. Jones: I object to the question.

271 The Witness: Yes, in every way. There was not the slightest idea of any risk in a ship like this going from Bremen to Hamburg.

272 Mr. Griffin: Do you know whether it has been customary or frequent in the past to tow large steamers in the River Elbe and the Weser, and if so, with how many tugs?

A. Mostly with two, but in other cases, with three. Very seldom, when there is a big ship, it is done with four tugs.

273 Q. With a ship like the "Isis", and under these conditions, how many tugs do you think were required?

A. Only two.

274 Q. How many were required for safety in this case, in your judgment?

A. Just three tugs.

275 Q. Have you had considerable experience of towing vessels yourself?

A. Not myself.

[fol. 209] 276 Q. I mean, being on vessels when they are towed?

A. Yes, changing the berths here in harbor and towing up and down the Elbe; many times I have had it myself.

277 Q. In your judgment were these tugs sufficiently powerful?

A. Yes, they were.

278 Q. If you had the same case again would you hesitate to send the ship with her rudder lashed?

A. No.

279 Mr. Jones: I object on the ground that it is immaterial as to what may be done on some other occasion.

280 Mr. Griffin: Do you know whether dry docks have been towed some way up and down rivers?

A. Yes.

281 Mr. Jones: I object, as immaterial, to what is done with dry docks.

282 Mr. Griffin: What do you say?

A. I saw it myself when the great dry dock came from Flensburg.

283 Q. Is it harder to tow a dry dock than to tow a ship like the "Isis"?

A. It is very hard to tow a dry dock because they have no power.

284 Q. Have you known cases where ships with a disabled rudder have navigated and come up the river, with twin screws?

A. Yes, I know of different cases.

285 Q. Can you tell us some of them?

A. One of the cases was the steamship "Deutschland", when she lost her rudder in the ocean. She came from New York, through the English Channel, right up the North Sea to Cuxhaven with no rudder and no tugs and she was only steered by her twin screws.

286 Q. Can you think of any other cases?

[fol. 210] A. I saw the "Garibaldi" about two years ago. She was sunk in the River Elbe and she was lifted up and convoyed by tugs up to the dry dock.

287 Q. How many tugs did she have, do you remember?

A. I think she had pontoons alongside to lift her up, and I think she had two tugs forward and one aft.

Cross-examination.

By Mr. Jones:

288 Q. I understood you to say that you were head marine superintendent for the Hamburg-America Line. Am I correct in so understanding?

A. Yes, that is so.

289 Q. And there is no higher official than yourself as marine superintendent?

A. No.

290 Q. You live in Hamburg?

A. Yes.

291 Q. And you have your office in the main office of the Hamburg-America Line where we are now?

A. Yes, that is right.

292 Q. And you were sent over, or did you go over of your own free will to see the "Isis"?

A. No, I was sent over.

293 Q. Who sent you over? A. The Board of Directors of the Hamburg-America Line.

294 Q. Did you report to them what you found when you got over there?

A. Afterwards when I came back I did because I had full power to act for the Hamburg-America Line.

295 Q. The Board of Directors gave you full power to act for the Hamburg-America Line?

A. Yes.

296 Q. So what you did, you did on behalf of the Hamburg-America Line?

A. Yes.

297 Q. As I understand you, it was you who made the decision to tow this vessel with a lashed rudder?

A. Yes.

[fol. 211] 298 Q. The Captain did not make that decision, but you made it?

A. I made it; but I left it to the Captain; if he had any wishes or any idea of risk or saw any difficulty in towing the ship, he was to say so.

299 Q. You made the decision, but you told the Captain that if he wanted to object, he might object?

A. Yes. We did all we could and we found out that everything was O. K.

300 Q. There are shipyards in Bremen which were fully capable of repairing the damage to the "Isis", are there not?

A. No; we only put it in dry-dock to lift it and look at the rudder.

301 Q. But a shipyard there could repair the damage?

A. No.

302 Q. Why not?

A. It would take about a fortnight to repair it there.

303 Q. The question I asked you is: Do you suggest that the shipyards in Bremen are not good shipyards?

A. Yes, they are very good shipyards and they could do it if they had time enough in which to do it.

304 Q. So the only thing with which you were concerned was saving time?

A. Yes.

305 Q. And there would be no trouble in putting the ship in dry-dock with cargo, would there?

A. No, there was no trouble about that.

306 Q. So she could have been docked full of cargo and repaired at Bremen?

A. Yes.

307 Q. And the only thing you had in mind was saving about two weeks time?

A. Yes.

308 Q. The decision to repair elsewhere than in Bremen was made for the benefit of the Hamburg-America Line, was it not?

A. Yes.

309 Q. Do you know that after the vessel left Bremen she still continued to sheer to starboard, even after you lashed the rudder in the way you did?

A. No; that is a great mistake.

[fol. 212] 310 Q. You do not know about that?

A. I spoke with the Captain——

311 Q. We will get the Captain's statement about that. In one of the papers which has been sent to me there is a reference to what is called "back pieces of the rudder". What are the back pieces of the rudder?

A. That means the rudder stem.

312 Q. Does it mean the rudder stock?

A. Yes, not the rudder blade.

313 Q. Do you mean what we call the rudder stock?

A. Yes.

314 Q. And that was twisted?

A. Yes.

315 Q. How about the stern frame—was that damaged?

A. No.

316 Q. The quadrant to which you have referred is not a part of the rudder at all—that is on deck, is it not?

A. Yes; there is a little deck house where the rudder engine is and that is where it is.

317 Q. You can never be certain as to whether or not you have fixed the rudder in a position so that the rudder will not move by fixing the quadrant, can you?

A. That is right.

318 Q. And that is the reason why you used a wire rope in addition to fixing the quadrant?

A. Yes.

319 Q. There is always a certain amount of play in wire rope, is there not?

A. No.

320 Q. Wire rope stretches, does it not?

A. It had tackles on to lift any slack.

321 Q. You can never be certain that there is not a further stretch in the rope, even after you put the tackles on, can you?

A. Yes.

322 Q. Is it not well-known that the River Weser is a winding river without too much water in it?

A. No, not more than the River Elbe. The dredged [fol. 213] channel in the River Weser [illegible]ry narrow in many places—about 100 meters.

323 Q. That is only about 300 ft. wide?

A. Yes.

324 Q. And for a big vessel going down the River Weser, especially when you have a strong current, it is a hazardous undertaking at best; is not that true?

A. Yes, if it is a big ship you have to be careful to keep in the middle and not to go to one of the sides.

325 Q. With the sharp bends in the river and with the narrow channel, it takes a good deal of care and pains to take a vessel down that narrow river?

A. Yes.

326 Q. Because it is very easy to get aground in the river, is it not?

A. Yes, that is so.

327 Q. You would not suggest that a rudder is a useless piece of mechanism for a ship, would you?

A. No.

328 Q. You would admit that a rudder is a most necessary part of the ship?

A. Yes; but instead of a rudder, we had two tugs.

329 Q. Would you suggest that two tug boats are as good as a rudder?

A. With the two engines too, yes.

330 Q. You think that with two engines and two tug boats you are as well off as you are with a rudder?

A. Yes, that is my opinion.

331 Q. In bringing a ship round a sharp bend is that so?

A. Yes, it is just the same, because we are maneuvering in the German Navy without any rudder—with twin screws.

332 Q. You do not do that in the River Weser and make these sharp bends, do you?

A. No, not there, but when exercising. If you have your own twin screws and two powerful tugs, one on each side, you do not need any rudder.

333 Q. Is it not a fact that Mr. Julicher told you that [fol. 214] he intended to come and look at the vessel in the morning of the 10th February and that he would give you a certificate after he had seen the vessel?

A. No, he could not see it in the morning because it was 7 o'clock at night when I spoke to him and he said: "It is not necessary for me to see the ship because what you have explained to me satisfies me."

334 Q. Do you mean to suggest that Mr. Julicher would give a certificate of seaworthiness without seeing the vessel?

A. Yes, because the engine was all right and the ship was all right. It was only the rudder that was twisted, and we had lashed it amidships, and he said that it was all right.

335 Q. So Mr. Julicher would give a certificate not only on his opinion but on your opinion?

A. Yes.

336 Q. Then what was the sense of going to see the vessel?

A. It was not only my opinion but the opinion of Mr. Schubert and Mr. Menck, and we spoke to Mr. Julicher and told him that all the other gentlemen were of the same opinion.

337 Q. Why did you not have Mr. Julicher there at the time you gentlemen were looking at this rudder?

A. Because we could not reach him—because he was somewhere in the town and we could not get him on the telephone before 7 o'clock.

338 Q. I have a letter which is signed by Mr. Brandt in which he states that the facts were as follows: "Mr. Julicher promised to give his certificate next morning as it was too late in the evening. Therefore he could not issue the certificate the same day." Is not that what he said to you?

A. Yes, and that is what I said. He said: "You are very lucky; I am just going out of the office; I have my [fol. 215] overcoat and my hat on, and I am just going home, so it is not possible to give you the certificate now, but I will send it tomorrow morning over to Hamburg."

339 Q. Did he ever send you the certificate?

A. I must say that I did not see it the next morning because in the meantime there was the second accident.

340 Q. Is it not a fact that he never did send the certificate?

A. It is possible—he did not send it to me, but he might have sent it on board.

341 Q. Is not that the reason the certificate was never sent; because Mr. Julicher never saw the ship?

A. I do not know; Mr. Julicher must explain it himself.

342 Q. You said this pilot died?

A. Yes.

343 Q. In one of the papers it is said that the pilot met with some accident and died as the result of the accident.

A. I think that when he left his ship he fell between the ship and the tug boat and was hurt, and he died afterwards.

344 Q. The accident killed him?

A. Yes.

345 Q. You were of opinion, as I understand from your direct examination, that it would be safer to go in the day time?

A. Yes, that was my first opinion.

346 Q. And the opinion which you had was based upon the fact that in the day time you can see better than you can at night time?

A. Yes.

347 Q. And going down a narrow river where there were sharp bends, you thought that in the day time you could see any inclination of the vessel one way or the other better than you could at night time?

A. Yes.

348 Q. And you still think so?

A. Yes, I think so.

[fol. 216] Redirect examination.

By Mr. Griffin:

349 Q. Do you think there was anything dangerous about taking this ship in the condition which you have described with those three tugs on that trip?

A. No.

350 Q. Do you think there was any danger in towing her down the river at 1 o'clock in the morning as you did do?

A. No, I did not see any danger because it was moonlight and I could not see any risk in going at 1 o'clock in the morning, because there are very good lights on the River Weser and very good buoys, and it was a good tide and there was not much traffic, and everything was all right for safe navigation, and the Pilot Commander told me that it would be best to do it at night, so I said: "All right; you

know your river better than I do, so your experience must be the best."

351 Q. Mr. Jones asked you whether you could fix the rudder firmly by screwing the quadrant, and I understood you to say that you could not. Did you understand the question, or is it the fact that you could not?

A. Yes, we could fix the rudder by the screws on the quadrant alone; but if we put the wire ropes on, it was a second security.

352 Q. Can you in fact fix the rudder firmly by screwing down the quadrant?

A. Yes.

353 Q. Mr. Jones also asked you whether there was not stretching in wire rope which might let the rudder move.

A. There is not so much play, because it is only a short distance from the rudder to the bollards—it is only about 10 or 12 meters.

354 Q. And I think you said that you pulled up the wire rope tight with the winches?

A. Yes, by tackles and winches.

355 Q. In your opinion could the rudder move after you had finished your job?

[fol. 217] A. No, it was absolutely fast; we tried to move it and we could not move it.

356 Q. I think there may have been a misunderstanding on your part about one question which was asked you in cross examination, and you said that the shipyards in Bremen could repair the ship. That is true, of course?

A. Yes.

357 Q. You were also asked whether you could have dry-docked the ship and had the repairs done with the cargo on board. Could you have done that?

A. We could not leave the ship with a whole cargo in dry dock for fourteen days.

358 Q. Why not?

A. Because it would be too heavy for the ship.

359 Q. Would it strain the ship?

A. Yes.

360 Q. When you put her in dry dock in order to examine the rudder was the whole ship put in dry dock?

A. Yes.

361 Q. Was she lifted dry?

A. No, not quite dry; there was a little water left. We only lifted it to see the rudder—we could not see the bottom.

362 Q. Why was it you wished to have her towed? Would you have had to discharge the cargo if you had repaired her in Bremen?

A. We would have had to discharge half of the cargo.

363 Q. And then store it and re-load it?

A. Yes. But we could not get a dry dock on the Weser for a long time. We spoke about it, but we had to leave the dock the next day, and we had to lay the ship somewhere to discharge the cargo and then wait until the dry dock was free.

364 Q. Do you know how long that would have been?

A. I do not know exactly, but one of the North German Lloyd Steamers was waiting for the dock. If we could not get it done on the Weser, we had to go to Bremerhaven or somewhere—we had to tow the ship somewhere.

[fol. 218] 365 Q. So the decision to tow the ship was not only so save time, but to save expense as regards the cargo?

366 Mr. Jones: I object.

367 The Witness: To save time and to save expenses and to do the best for everybody.

Recross examination.

By Mr. Jones:

368 Q. Captain, you understood the questions I put to you?

A. Yes.

369 Q. And you gave me the answers to my questions as you did, after you fully understood what I asked you, is that not true?

A. Yes.

Further redirect examination.

By Mr. Griffin:

370 Q. Did you intend to testify in answer to Mr. Jones that you could have docked the ship and repaired her with all her cargo on board?

A. No. I thought the question was: "If you could repair the ship with the cargo out". We could repair the ship in Bremen, but not with the whole cargo in. You could put

the ship in the dock for a few hours to see what had happened, but we could not lift the ship for the whole of the fourteen days in a dry dock.

371 Mr. Griffin: I thought you misunderstood and that is why I asked the question.

Further recross examination.

By Mr. Jones:

372 Q. How much cargo do you think you would have had to discharge?

A. We do not like to have to discharge any cargo.

[fol. 219] 373 Q. But how much would you have to discharge. 1,000 tons or 2,000 tons?

A. About 3,000 tons—about half of the cargo.

374 Q. And discharging 3,000 tons would have been sufficient?

A. Yes.

375 Q. Is it not the fact that the reason you did not repair the ship at Bremen was because you wanted to save time for the ship?

A. No, not alone for the ship, but to save the cargo, too.

376 Q. You wanted to save time, and that is the reason you did not repair the ship at Bremen; is that not true?

A. We thought it would be best not to discharge the whole cargo in Bremen and lay there for about two or three weeks and to take the cargo in again and to bring the ship on to Hamburg, so I thought it would be safer to leave the cargo in the ship and to bring the ship with the tug boats to Hamburg.

377 Q. Have you not just told me that you would only have to discharge about 3,000 tons in order to repair the ship?

A. No.

378 Q. You said that just now, did you not?

A. Yes.

379 Q. It would not have been necessary to discharge more than 3,000 tons in order to repair the ship in Bremen. Is that not true?

A. You can do such a thing if it is absolutely necessary—you could leave 3,000 tons of cargo in the ship and take her in dry dock to repair her. But no shipbuilder likes to do

such a thing because it strains the ship very much in the dry dock.

380 Q. How many ships are admitted into dry dock with cargo in them?

A. They seldom do it.

381 Q. I have known many, and so have you——

382 Mr. Griffin: How much cargo? That makes a difference.

[fol. 220] 383 Mr. Jones: The Captain has told me that it would be safe to do it with 3,000 tons on board.

384 Mr. Griffin: He said that it would be possible, but that it would be undesirable.

385 Mr. Jones: Do you want to modify that?

A. There is always a risk in doing it.

386 Q. Is there always risk in dry docking a ship?

A. No, not when it is empty.

387 Q. How many dry docks are there at Bremen?

A. There is only one dry dock for a ship of the size of the "Isis".

388 Q. There is the big dock that one sees in Bremen.

A. There are two there, together.

389 Mr. Griffin: Are both of them large enough for the "Isis"?

A. Yes. One was engaged, and as regards the other one, the "Seidleitz" came out and we went in.

390 Mr. Jones: But there would be no difficulty in docking the "Isis" in Bremen with 3,000 tons of cargo in her and repair her rudder properly?

A. It would have been possible to do it.

391 Q. I understand you to say that the reason the decision was come to to tow the ship was because you wanted to save time?

A. Not only to save time, but to leave the cargo in the ship and to take it direct to the place of destination—so as not to take the Hamburg cargo out in Bremen.

392 Q. You knew, did you not, that there was a risk in towing a ship, which could not steer, down a winding twist-
[fol. 221] ing shallow river, such as the River Weser?

A. There was no risk at all because they brought big battleships to Bremen, and a ship like this went down in the same way.

393 Q. But a battleship has a rudder?

A. Yes, but it is more difficult to bring a ship like the "Bremen" down with a rudder than to bring a ship like the "Isis" down without a rudder.

394 Q. Have you ever known the "Bremen"—go down the Weser at night time?

A. If there is a good flood tide, they do it.

395 Q. Have you ever known it?

A. I do not know if they get down from Bremen to Bremerhaven in one night, so I do not know exactly.

396 Q. Can you give me a single instance when the "Bremen" has been down from Bremen to Bremerhaven in the night time?

A. No, I cannot answer that question because I do not know whether it was day time or night time when they brought the "Bremen" down.

397 Q. You never knew the "Bremen" — go down the river when she had no rudder?

A. Yes, she had a rudder.

398 Q. She had a rudder always?

A. Yes.

Further redirect examination.

By Mr. Griffin:

399 Q. As I understand you, on the matter of docking the ship with cargo, you say that it would have been possible to dock her with 3,000 tons of cargo, but that it would have been undesirable?

A. Yes.

400 Mr. Jones: Are these floating docks or graving docks at Bremen?

A. Floating docks.

(Adjourned for a short time.)

[fol. 222] 401 Mr. Griffin: When you saw the ship in dry dock and looked at the rudder, could you see the whole of the rudder?

A. You could see the whole of the rudder because we pumped the dock up so that we could see the whole of the rudder, but the bottom of the ship was still in the water.

402 Q. After the ship grounded on the second occasion you did not see her, I believe?

A. No.

(The witness withdrew).

Captain HEINRICH KLAASSEN, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

403 Q. What is your full name?

A. Heinrich Klaassen.

404 Q. What is your occupation?

A. (Through the Interpreter:) Captain.

405 Q. (Through the Interpreter:) Captain of what vessel?

A. (Through the Interpreter:) Captain of the tug "Lankenau".

406 Q. (Through the Interpreter:) By whom are you employed?

A. (Through the Interpreter:) The Unter Weser Reederei A. G. of Bremen.

407 Q. How long have you been Captain of tug boats on the River Weser?

A. Since 1901.

408 Q. And Mate from when?

A. From 1898.

409 Q. How long have you been Master of the tug "Lankenau"?

A. Three years on board the ship; we have had her three years.

[fol. 223] 410 Q. Was she built three years ago?

A. No, she is an old ship.

411 Q. What is her horsepower?

A. She is 800 horsepower.

412 Q. (Through the Interpreter:) And it was the same horsepower in the year 1928?

A. (Through the Interpreter:) Yes.

413 Q. (Through the Interpreter:) You were in command of the tug "Lankenau" when the steamer "Isis" was towed from Bremen on the 10th February, 1928?

A. Yes.

414 Q. On which side of the vessel was your tug?

A. On the port side.

415 Q. And which tug was on the starboard side?

A. The "Eversand".

416 Q. And which tug was ahead?

A. The "Hoheweg".

417 Q. What was the horsepower of the "Hoheweg"?

A. About 1,050—a little more than 1,000.

418 Q. And what was the horsepower of the "Eversand"?

A. 810 or 820.

419 Q. Who was the Captain of the "Eversand"?

A. Zey.

420 Q. Where is he now?

A. He is now in the Baltic.

421 Q. Do you know how many years experience he has had on the River Weser?

A. About eight to nine years—I do not know exactly.

422 Q. As Captain?

A. Yes.

423 Q. Who was the Master of the "Hoheweg"?

A. Nannen.

424 Q. Where is he now?

A. In France.

425 Q. How many years experience has he had as Captain?

A. About twenty years—I cannot say the exact number of years.

426 Q. (Through the Interpreter:) During your expe- [fol. 224] rience on the River Weser have you frequently towed steamers.

A. Yes.

427 Q. Have you ever towed steamers which have had their rudders disabled?

A. Yes.

428 Q. Have you ever towed steamers with their engines disabled?

A. Yes.

429 Q. How large steamers?

A. 6,000, 7,000 or 8,000 tons.

430 Q. Have you towed them at night?

A. Yes, sometimes at night and sometimes in the fog and when it is blowing.

431 Q. Do you remember about what time you left Bremen with the "Isis"?

A. No.

432 Q. Not what time of the day?

A. I have forgotten it.

433 Q. Was it at night?

A. Yes, I believe it was two o'clock, but I cannot say exactly.

434 Q. Do you remember how the tide was?

A. It was starting to flood.

435 Q. Was that a good condition of the tide?

A. (Through the Interpreter:) Yes. It is usual for big ships leaving Bremen to do so when the tide is at the flood.

436 Q. (Through the Interpreter:) What is the reason?

A. (Through the Interpreter:) Because they cannot do it on one tide if they do not do it on the flood tide because they can only get as far as Brake.

437 Q. (Through the Interpreter:) Is there any advantage in having the flood tide in steering or handling the ship?

A. (Through the Interpreter:) It is about the same.

438 Q. (Through the Interpreter:) As a result of your experience of about 30 years as captain on the River Weser, will you state whether or not in your opinion the ship "Isis" had sufficient tugs and sufficiently powerful tugs to [fol. 225] be seaworthy to proceed upon this voyage?

A. (Through the Interpreter:) According to my opinion it was sufficient—the tugs were powerful enough.

438 Q. As you went down the river with the ship before this accident happened, had you any trouble in handling or steering the ship?

A. No.

439 Q. Do you know what the cause of the accident was?

A. No.

440 Q. Do you remember passing a steamer coming up the river shortly before the accident?

A. Yes, close to Lesum.

441 Q. Which side did that steamer pass?

A. On the port side.

442 Q. Do you remember whether there was a strong wind or not?

A. There was no strong wind, but I forget which way it was coming.

443 Q. How were the engines on your tug working when you passed the steamer?

A. Full speed ahead.

444 Q. (Through the Interpreter:) Did you make any change in your engines before the ship went ashore?

A. (Through the Interpreter:) The engines were left at full speed for the whole time until the opposite steamer came up.

445 Q. After that, what happened?

A. (Through the Interpreter:) The engines were stopped.

446 Q. Did you keep going astern until the ship grounded?

A. Yes, all the way.

447 Q. You do not know what the tug on the other side was doing?

A. No, I could not see.

448 Q. When the ship passed you, you could see the tug which was ahead of you?

A. Yes, she went over to port.

449 Q. I am talking of the time before the ship passed you. Could you see the tug which was ahead of you?

A. No.

[fol. 226] 450 Q. After the ship passed you, could you see the tug ahead of you?

A. Yes.

451 Q. And then she was pulling where?

A. She was pulling over to the port side—to the left.

452 Q. Do you remember whether it was a bright night or a dark night?

A. No, it was not dark.

453 Q. Was it moonlight?

A. Yes, it was a clear night.

454 Q. When you have towed the large ships of which you have spoken, with the rudder disabled or the engines disabled, in the River Weser, how many tugs have you used?

A. We have used four smaller tugs.

455 Q. And these tugs?

A. Three.

456 Q. How powerful tugs did you use when you used four?

A. Two about 250 horsepower each and two about 350 horsepower each.

457 Q. (Through the Interpreter:) How long ago did your company get these larger tugs?

A. (Through the Interpreter:) Three years ago.

458 Q. (Through the Interpreter:) How old is the "Hoheweg"?

A. (Through the Interpreter): Tug "Hoheweg" is about 8 or 9 or 10 years old.

459 Q. (Through the Interpreter:) When you tow steamers with the rudder or the engines disabled, with tugs of the size and power of the three you had for the "Isis", how many tugs do you use?

A. Two large ones and two small ones.

460 Q. (Through the Interpreter:) And if you have them all large ones how many do you use?

A. (Through the Interpreter): There were no large ones formerly.

461 Q. Since you have had the large ones, when you tow the large ships with the present large tugs, how many do you use?

A. Three, to tow ships of 10,000 tons or 12,000 tons from [fol. 227] one dock to the other.

462 Q. Do you mean in the River Weser?

A. Yes.

463 Q. (Through the Interpreter:) When you have tugs of the size and power of the three that you had for the "Isis," are they sufficient to handle the "Isis" loaded as she was?

A. (Through the Interpreter:) Yes, completely.

464 Q. Did you know that the rudder of the "Isis" had been damaged?

A. Yes.

465 Q. Were the engines of the "Isis" in use?

A. Yes.

466 Q. Was she twin screw?

A. Yes.

467 Q. Can a twin screw ship be steered better?

A. Yes, because they can maneuver with the screws.

468 Q. As a result of your experience do you think that the ship with those three tugs was seaworthy?

A. Yes.

469 Mr. Jones: I object because the witness is not qualified; he did not see the ship in dry dock and he did not know anything about the condition of the ship.

469 Mr. Griffin (Through the Interpreter:) Do you know whether the rudder of the ship was fastened in any way?

A. (Through the Interpreter:) I do not know; we just came and towed her away.

Cross-examination.

By Mr. Jones:

470 Q. What is the name of any ship, other than the "Isis," which you towed from Bremen down the River Weser where the rudder was not of any service?

A. All the Rickmer's Line.

[fol. 228] 471 Q. Are the rudders of those ships useless?

A. Sometimes.

472 Q. Give me a single case where the rudder was lashed in the way the rudder of the "Isis" was lashed.

A. I cannot.

473 Q. Is it not a fact that the rudders in all those ships could be used?

A. Some could and some could not.

474 Q. Can you give me the name of a single case where the rudder can be used?

A. No, I cannot.

475 Q. (Through the Interpreter:) Is it not a fact that the River Weser from Bremen to Bremerhaven is winding and narrow?

A. (Through the Interpreter:) Yes, especially from Brake upward, but the lower river is not so winding.

476 Q. (Through the Interpreter:) The bends in the river are sharp, are they not?

A. (Through the Interpreter:) Some bends are rather sharp—yes, up to Vegesack there were several sharp corners.

477 Q. (Through the Interpreter:) At the time when the "Isis" was towed down, were there any sharp bends in the river?

A. (Through the Interpreter:) Most of them were fairly sharp; but that is no obstacle to shipping.

478 Q. (Through the Interpreter:) The channel of the River Weser is only 100 meters in width, is it not?

A. (Through the Interpreter:) I do not know.

479 Q. Do you mean to say that you have been towing on the River Weser for many years and you do not know how wide the channel is?

A. Yes.

480 Q. (Through the Interpreter:) Do you remember giving testimony at the Admiralty Court at Bremerhaven on the 24th March, 1928?

A. Yes.

[fol. 229] 481 Q. (Through the Interpreter:) You told the Judges at that Court that at kilometer 17.2 you went continually astern because the S. S. "Isis" was continually swinging to port.

A. The "port" is wrong, it should be "starboard," the right side.

482 Q. Then it is correct to say that you did tell the Judges at that Court that at kilometer 17.2, although you went continually astern on the tug which you commanded, the S. S. "Isis" was at all times swinging to starboard.

483 Mr. Griffin: I object to your saying "at all times."

484 Mr. Jones (Through the Interpreter:) Then strike out "at all times." It is correct to say that you did tell the Judges of that Court that at kilometer 17.2, although you went continually astern on the tug which you commanded, the S. S. "Isis" was swinging to starboard?

A. (Through the Interpreter:) We had to go astern because the steamer sheered off to starboard.

485 Q. (Through the Interpreter:) I ask you whether or not you did not say to the Judges of the Court at Bremerhaven these words "At kilometer 17.2 I went continually astern because the S. S. 'Isis' was swinging to starboard"?

A. (Through the Interpreter:) Yes, I have said so, and so it says in the document.

486 Q. Did you not tell them the truth?

A. Yes.

487 Q. (Through the Interpreter:) Then as a matter of fact the "Isis" would not steer and did swing off to her starboard in spite of all the efforts of your tugs?

A. Yes, otherwise she would not have run aground.

(The witness withdrew.)

[fol. 230] ADOLF JULICHER, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

488 Q. Are you Chief of the Germanischer-Lloyd in Bremen?

A. Yes, for shipbuilding.

489 Q. How long have you held that position?

A. 22 years.

490 Q. Are you a naval architect?

A. Yes, I am.

491 Q. Where did you study?

A. I have studied in Charlottenberg, Berlin.

492 Q. How long?

A. Six years.

493 Q. After you left there where did you go?

A. Then I went to the Danube Shipbuilding Company, Buda-Pesth.

494 Q. What work did you do there?

A. I was constructor.

495 Q. Then where did you go?

A. Then I went to the Actiengesellschaft Weser.

496 Q. As chief constructor?

A. Yes.

497 Q. How long did you hold that position?

A. 14 years.

498 Q. As chief of the Germanischer-Lloyd in Bremen, is it part of your duty to give certificates of seaworthiness?

A. Yes.

499 Q. Do you remember the case of the "Isis"?

A. I do.

500 Q. Can you tell us what you remember about it?

A. (Through the Interpreter:) I remember Captain Reichenbächer rang me up on the telephone.

501 Q. What did he say?

A. (Through the Interpreter:) He said that the "Isis" had twisted her rudder and that he intended to transport the ship with three tugs, with the rudder made fast amid-[fol. 231] ships, to Hamburg. He said the engines were in order and that the ship could use the twin screws for steering.

502 Q. (Through the Interpreter:) Did he ask you anything?

A. Yes, Captain Reichenbächer asked me if I had any objection to that.

503 Q. What did you say?

A. I said to him that I was of the opinion that the ship, in the condition he mentioned, was (through the Interpreter) capable of being conveyed there.

504 Q. Did he ask you for a certificate of seaworthiness?

A. I was of the opinion that the ship could be steered with the assistance of the three tugs and at the same time using the twin screws.

505 Q. (Through the Interpreter:) Did he ask you for a certificate of seaworthiness?

A. Yes.

506 Q. What answer did you give him?

A. I said I could give him the certificate.

507 Q. What time in the day was this?

A. I think it was 7 o'clock.

508 Q. In the evening?

A. Yes, in the evening.

509 Q. Do you remember whether you told him when the certificate would be given?

A. (Through the Interpreter:) I do not remember that, I said when it could be issued, but I said that I could issue it.

510 Q. Had you seen the ship with the rudder damaged and fastened?

A. No. I had seen the ship, but it was not necessary for me to see it again, because the ship was practically not damaged. (Through the Interpreter:) The matter was clear; it had nothing to do with the ship; it was only a question of principle.

511 Q. Do you mean that you had before you all the facts that you needed, without seeing the ship?

A. (Through the Interpreter:) I did not know that the [fol. 232] ship was going to leave the same night, and I believe they only decided upon that later on.

512 Q. Had you any objection to her going late at night?

A. No, I had not.

513 Mr. Jones: I object to that.

514 The Witness: It was an advantage, for the reason that the traffic during the night-time was not so brisk.

515 Mr. Griffin (Through the Interpreter): Do you remember what kind of night it was—whether it was clear or not?

A. I cannot say exactly.

516 Q. (Through the Interpreter:) Did you actually send the certificate the next day or not?

A. No, I did not. The ship had suffered the damage, but I did not think it necessary any longer.

517 Q. Did you subsequently give the certificate I now give you?

(Same handed.)

A. Yes.

518 Mr. Jones: I object to that as immaterial.

519 Mr. Griffin: I offer the certificate, and it is the Respondent's Exhibit 5.

520 Mr. Jones: I object to it as immaterial; the date of the certificate is the 26th June, 1928, a date long after the date of the stranding and furthermore, it is further apparent, as one of the witnesses testified, that the witness's statements are based purely on hearsay.

(The certificate was marked "Respondent's Exhibit 5".)

[fol. 233] 521 Mr. Griffin: Is that your signature upon that document? (Referring to Respondent's Exhibit 5.)

A. Yes, it is.

522 Q. (Through the Interpreter:) Is there any practice or rule that you know of, about the number of tugs to be used when a vessel's rudder is disabled in these waters?

523 Mr. Jones: I object to that.

524 The Witness: No, there is no practice.

525 Mr. Griffin: In your opinion was the ship seaworthy to proceed on this trip with the rudder lashed and three tugs——

526 Mr. Jones: I object, as the witness is not qualified and did not see the ship, and knows nothing about it except hearsay.

527 Mr. Griffin (through the Interpreter): With three tugs, of 1080, 810 and 800 horse power, together with her

own engines with twin screws of about 2,400 horse power, was the ship, with these three tugs and the rudder lashed amidships, seaworthy to proceed on the trip in question?

528 A. Yes, certainly.

Cross-examination.

By Mr. Jones:

529 Q. (Through the Interpreter:) Was it explained to you that the vessel was going to Antwerp as well as to Hamburg?

530 Mr. Griffin: I object, as there is no evidence that she was going to Antwerp.

531 The Witness (through the Interpreter): As far as [fol. 234] I know the ship was to go to Hamburg in order to be repaired there.

532 Mr. Jones (through the Interpreter): And after repairs, to deliver her Antwerp cargo.

533 Mr. Griffin: I make the same objection.

534 The Witness (through the Interpreter): I do not know where she was intended to go to afterwards.

535 Mr. Jones (through the Interpreter): Is it your custom to give seaworthy certificates when you do not see a vessel?

536 A. (Through the Interpreter:) Even if I had seen the ship I should have no more knowledge of her in any case than I had.

537 Q. (Through the Interpreter): Is it not obvious that if you had seen the ship, you could yourself have seen the condition of the rudder and the way in which the rudder was made fast, and you would have been able to form an opinion as to whether or not the ship would have been able to steer straight as she proceeded down the river; but without seeing the ship it was quite impossible for you to form any opinion, and all you could do was to pass your judgment upon what someone else told you?

A. (Through the Interpreter:) This was immaterial, because I should depend upon what I was told.

538 Q. (Through the Interpreter:) As a matter of fact, you did not issue your certificate of seaworthiness because you had not seen the vessel—is that not the fact?

A. (Through the Interpreter:) No, that was not the reason.

539 Q. (Through the Interpreter:) Then why did you [fol. 235] not issue your certificate of seaworthiness?

A. (Through the Interpreter:) I did not think it necessary any longer.

540 Q. (Through the Interpreter): Did you not know, after the accident happened, that the owners needed the certificate of seaworthiness even more than they did before?

A. (Through the Interpreter): I wrote that down subsequently, but this information could have been had from me at any subsequent time.

541 Q. (Through the Interpreter:) You did not give the certificate of seaworthiness until the 26th of June?

A. (Through the Interpreter:) I did so, because I was not asked to do so before.

542 Q. (Through the Interpreter:) Were you not asked to issue the certificate of seaworthiness on the 9th February, 1928?

A. (Through the Interpreter:) I do not remember.

543 Q. (Through the Interpreter:) You told Mr. Griffin, in reply to a question which he put to you, that on the 9th February 1928, when Captain Reichenbächer called you on the telephone, that Captain Reichenbächer asked you for a certificate of seaworthiness. Is that true or untrue?

A. I do not remember now.

544 Q. (Through the Interpreter:) When you testified, in response to Mr. Griffin's question, that Captain Reichenbächer asked you for a certificate of seaworthiness and you told him "Yes", you answered a question which you knew nothing about because you did not remember. Is that correct?

A. (Through the Interpreter:) I did not say so.

545 Q. (Through the Interpreter): Do you mean that you did not tell Mr. Griffin that Captain Reichenbächer asked you for a certificate of seaworthiness?

A. (Through the Interpreter:) I told Captain Reichen- [fol. 236] bächer that I would issue a certificate of seaworthiness. The matter is quite clear. I was asked by Captain Reichenbächer to issue a certificate, but as it was not asked of me afterwards I did not do so immediately, but at a later date it was issued by me.

546 Q. (Through the Interpreter:) Have you ever issued a certificate of seaworthiness for a vessel which you have never seen?

A. (Through the Interpreter): It all depends upon what the seaworthiness is which is referred to.

547 Q. (Through the Interpreter:) In other words, your certificates of seaworthiness do not bear any evidence whatever to the actual condition of the ship, but merely refer to the records of the ship?

A. No, that is not the case.

548 Q. (Through the Interpreter:) If you do not see a ship how can your certificate be treated with any respect as to the actual condition of the ship?

A. (Through the Interpreter:) I have already said that I see a vessel and then I issue my certificate; but in this case I did not see the vessel.

549 Q. (Through the Interpreter:) So this is an exceptional case?

A. (Through the Interpreter:) What does "exceptional" mean? It was not necessary in this case. What should I have seen of the vessel?

550 Q. (Through the Interpreter:) Is it or is it not always necessary when a person certifies to a fact to know of his own knowledge that the fact is true and not base his opinion upon what somebody else tells him?

A. (Through the Interpreter): That is nothing to do with the case. I have said what is written in that letter, and this referred to a matter of principle.

551 Q. (Through the Interpreter): Do you think it is unimportant whether the rudder is exactly in the amidships [fol. 237] line of the ship or whether the rudder is a little to starboard or a little to port?

A. (Through the Interpreter:) The rudder must be in the amidships section.

552 Q. (Through the Interpreter:) How can you know of your own knowledge that the rudder is absolutely in the amidship section without seeing for yourself?

A. (Through the Interpreter:) I have already told you that Captain Reichenbächer asked me whether I had any objections if the rudder were placed amidships. If the rudder was placed amidships and if three tugs were at the disposal of the ship and if the ship could also use her own twin screws, it would be capable of being steered and con-

veyed to Hamburg, and I would issue a certificate to that effect.

553 Q. (Through the Interpreter:) If the ship showed a tendency to sheer off to starboard then it is obvious that the rudder was not absolutely amidships; is that not the fact?

A. (Through the Interpreter:) No; this may be caused by the current or by other causes.

554 Q. (Through the Interpreter:) If it was observed as the ship proceeded down the Channel that the ship showed a tendency always to sheer off to starboard, how could that be caused by the current?

A. (Through the Interpreter:) As far as I know from the proceedings before the Marine Court, the ship steered very well as far as Vegesack, the place where the accident occurred. There they passed some dredgers and a steamer, and the "Isis" turned in the starboard direction, which was not necessary because she showed her own two red lights, which are the emergency lights——

555 Mr. Jones: I move to strike out the latter part of the [fol. 238] answer as being volunteered by the witness and being entirely unresponsive to the question.

556 The Witness (through the Interpreter):—and then the ship was subjected to the strong current from the Lesumtief, so that she could not make head against it.

557 Mr. Jones (through the Interpreter): You referred to the Marine Court. Do you mean the Seeamt at Bremerhaven?

A. Yes.

558 Q. (Through the Interpreter:) I show you the document which is supposed to be the evidence before the Marine Court, and I ask you if that is the evidence to which you refer? (Same handed to witness.)

A. (Through the Interpreter:) I did not give any evidence before the Marine Court.

559 Q. (Through the Interpreter:) You referred just now to the evidence before the Marine Court and I want to know whether the document which I have handed you is the evidence before the Marine Court to which you referred just now.

A. (Through the Interpreter:) No, I referred to the report in the "Weser Zeitung".

560 Q. (Through the Interpreter:) You said in your previous answer that you referred to the evidence in the Marine Court. Is there any other record of the evidence before the Marine Court than the official record which I have handed to you?

A. (Through the Interpreter:) I referred all along to the report printed in the "Weser Zeitung".

561 Q. (Through the Interpreter:) Is that a newspaper?

A. Yes.

562 Q. (Through the Interpreter:) Then you are basing your evidence upon a newspaper account and not on any [fol. 239] official report?

A. (Through the Interpreter:) Which evidence?

563 Q. (Through the Interpreter:) You referred to the evidence before the Marine Court at Bremerhaven and I want to know whether you were basing your evidence upon a newspaper account of that evidence, or upon the official account of that evidence?

A. (Through the Interpreter:) I referred to the newspaper.

564 Mr. Jones: I move to strike out all of this witness's evidence with respect to the Marine Court at Bremerhaven, because, according to his own confession, it was based upon a newspaper account and not on an official account.

565 The Witness (through the Interpreter): (After reading through the report): I read in the report which you have handed me, the same as I read in the newspaper.

566 Q. (Through the Interpreter:) Is that official report which you have there, the report upon which you base your testimony?

A. (Through the Interpreter:) It says here in the report that differences arose as to the strength of the engines.

567 Mr. Griffin (through the Interpreter): Please confine yourself to answering the questions or we shall never get through. Is that the paper to which you referred or not?

A. (Through the Interpreter:) Yes.

568 Mr. Jones: I ask that be marked "Exhibit A" and I offer it in evidence.

[fol. 240] 569 Mr. Griffin: I object to it as incompetent, irrelevant and immaterial in every respect. It is immaterial to the issues, unless as a basis for cross examining witnesses, if testified.

570 Mr. Jones: Then I ask for it to be marked "Exhibit A".

571 Mr. Griffin: I object on the further ground that the document is not what it purports to be and is not properly proved.

572 Mr. Jones: Then I shall have to get the man over from Bremen to prove it.

573 Mr. Griffin: I will examine it, if you like, to see if I can agree it, so as to save you trouble, I will look it through later on.

574 Mr. Jones: Very well.

(The Official Report was marked "Libellant's Exhibit A".)

575 Mr. Jones: Is it not the fact that you told Captain Reichenbächer, when he called you over the telephone, that it was too late for you to go to the "Isis" on the evening that he called you up, but that you would go the next morning and that you intended to go the next morning to see the ship for yourself and that to your surprise, when the next morning came, the ship was gone and that is the reason why you did not issue your certificate of seaworthiness?

A. (Through the Interpreter:) No, it was not like that.

576 Q. (Through the Interpreter:) Did you not intend to go and see the steamer before you gave a certificate of [fol. 241] seaworthiness?

A. (Through the Interpreter:) I would like to state that the matter has been distorted. The matter was as follows: The question was whether I agreed to a ship proceeding to Hamburg with the rudder lashed and with three powerful tugs and her own engine power, and thereupon I said that I had no objection to this being done.

577 Q. (Through the Interpreter:) Captain Reichenbächer says that he asked you for a certificate of seaworthiness and you have said that Captain Reichenbächer asked you for a certificate of seaworthiness. Did you not intend to go and see the ship before you gave a certificate of seaworthiness?

A. (Through the Interpreter:) As this was a matter of principle, namely, the principle of the steering capacity of the ship, it was not exactly necessary.

578 Q. (Through the Interpreter:) Would you be good enough to answer the question? Did you or did you not intend to go to see the "Isis"?

A. (Through the Interpreter:) If the ship had still been there I should have gone to see her.

579 Q. (Through the Interpreter:) You told Mr. Griffin that when you talked to Captain Reichenbächer over the telephone you thought the ship would still be there. Is that true or untrue?

A. (Through the Interpreter:) No, I did not say so.

580 Q. (Through the Interpreter:) When Captain Reichenbächer talked to you over the telephone did you think that the ship was not to sail that night, or was to sail that night?

A. (Through the Interpreter:) I did not know that.

581 Q. (Through the Interpreter:) You did not know that the ship was going to sail that night?

A. (Through the Interpreter:) I did not know that, and [fol. 242] I believe that this was only decided upon later on in view of what the pilot said.

582 Mr. Jones: I move to strike out the witness's reference to the pilot as being purely guessing.

Redirect examination.

By Mr. Griffin:

583 Q. (Through the Interpreter:) Do you know upon what date it was when you had your conversation with Captain Reichenbächer?

A. (Through the Interpreter:) It was on the same evening when the ship was in dock.

584 Q. (Through the Interpreter:) Do you remember what date that was or not?

A. (Through the Interpreter:) I do not know from memory, but I can find that out from my books.

585 Q. (Through the Interpreter:) Had you seen the steamer "Isis" on other occasions so that you knew the ship?

A. (Through the Interpreter:) I cannot say for certain; but I believe that I had seen her on some previous occasion.

580 Q. (Through the Interpreter:) Have you ever seen this paper which has been marked "Exhibit A", or any copy of it, before to-day?

A. (Through the Interpreter:) No, I have only read the Marine Court proceedings as published by the "Weser Zeitung".

587 Mr. Jones: Will you satisfy yourself that Exhibit A is an official copy? If not, I will prove it by getting it certified.

588 Mr. Griffin: I do not think I have it in German; but if I have, I will be glad to compare it and certify it. If you like, I will ask Dr. Schütte and see if he agrees.

[fol. 243] 589 Mr. Jones: Very well.

(The witness withdrew.)

ADOLPHE MENCK, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin through the Interpreter:

590 Q. What is your name?

A. Adolphe Menck.

591 Q. What is your business?

A. I am Chief Engineer at the Actiengesellschaft Weser, and I have the whole of the shipbuilding and repairs under my care.

592 Q. When you use the word "Engineer", does that mean that you deal with machinery rather than hulls?

A. I have nothing to do with engines.

593 Q. With what Company are you connected?

A. With the Actiengesellschaft Weser.

594 Q. How long have you held that position?

A. Since 1921.

595 Q. Before that what were you doing?

A. Before that I was a Work's Engineer at Messrs. Tecklenborg.

596 Q. Did the steamer "Isis" come to your shipyard in February, 1928, before the accident which we are discussing?

A. No, not before.

597 Q. There were two accidents to her; it was after the first one that she came, was it not?

A. Yes, she came after the first accident.

598 Q. Was she put into your dry dock?

A. Yes, she entered our dry dock.

599 Q. Did you see her there?

A. Yes, I saw her there.

[fol. 244] 600 Q. Did you examine her rudder?

A. Yes, I did.

601 Q. What was the condition of the rudder?

A. The rudder blade was straight, but the rudder post was twisted.

602 Q. What was done with the rudder by way of fastening it?

A. Steel ropes were fastened to each side and these were made taut by means of a winch and fastened to the mooring post. On deck there is a brake for fastening the quadrant.

603 Q. What was done with that?

A. It was made fast.

604 Q. By what means?

A. There is a screw on deck on the quadrant, and this screw was turned round.

605 Q. Were there two screws, one on each side?

A. I do not remember—many ships have two and many have one; but I do not remember.

606 Q. When the rudder was fastened in this way, in what position was the rudder blade?

A. Four persons including the foreman saw that the rudder blade was straight.

607 Q. Did you see it yourself?

A. Yes.

608 Q. And was it straight?

A. Yes.

609 Q. Amidships?

A. Yes.

610 Q. Did you see the ship after the second accident when she returned to your yard?

A. Yes.

611 Q. How was the rudder blade standing then—was it amidships or not?

A. The rudder itself was still amidships.

612 Q. And were the lashings still tight?

A. The lashings were still tight.

613 Q. Was the screw, or screws, still tight?

A. They were still tight.

614 Q. What did you notice about the rudder blade itself at that time?

A. After the second accident the rudder blade was bent.

[fol. 245] 615 Q. What part of it?

A. The lower part.

616 Q. Does your Company build engines as well as ships?

A. Yes, everything.

617 Q. Have you had any occasion at your shipyard to have ships towed up or down the Weser?

A. Not at our own works, but when I was at Messrs. Tecklenborg's I had opportunities of seeing vessels belonging to the Rickmers Company being towed. Once we had a Norwegian steamer, the "Stig Gorthon", which was very heavily damaged and she was fastened by means of two pontoons.

618 Q. Where was she towed?

A. From near Farge towards our yard.

619 Q. Did she go up to Bremen?

A. Yes, she did, to our docks.

620 Q. Where was the place from which she came—was it near the mouth of the Weser or somewhere else?

A. Farge is situated about half an hour below Vegesack.

621 Q. How large a ship was she?

A. 4,000 tons gross.

622 Q. Was there water in her?

A. She was nearly sinking, and it was necessary to have her constantly pumped.

623 Q. How many tugs actually towed her up?

A. There were about seven tugs altogether, about three or four of which were engaged in pumping. But these tugs were not very powerful.

624 Q. How powerful were they?

A. The average horse power was between 300 and 450.

625 Q. What has been your experience as to whether vessels, towing up and down the Weser tow at night?

A. I cannot say much about that because I have no direct experience, being engaged in shipbuilding myself.

[fol. 246] 626 Q. Have you any knowledge as to whether they tow with the tide or against the tide?

A. It is necessary, on principle, to tow against the tide. All ships which leave the port of Bremen do so about one

hour after the flood begins to run. The same thing was done with the "Bremen".

627 Q. Do you know the tug "Hoheweg"?

A. Yes, she is the best Unter Weser tug.

628 Q. Do you know the tug "Eversand"?

A. Yes.

629 Q. Do you know the tug "Lankenau"?

A. Yes.

630 Q. With the "Isis" as you saw her at your shipyard, will you state whether or not in your opinion it was safe to tow her down the river with her rudder lashed and with the three tugs which I have named assisting her, and with her engines and twin screws available for use?

A. Yes. I am not a seaman and I have no seagoing experience; but I have had a great deal to do with ships and must be in a position to form an opinion about their movements.

631 Mr. Jones: I move to strike out the witness's testimony in this respect, because by his own answer he is clearly not qualified to answer the question.

632 Mr. Griffin: What is your opinion?

A. I am of opinion that the ship's own power, together with that of the tugs, is sufficient to move the ship forward and to keep her steering capacity.

633 Q. Does your answer apply to a trip from Bremen down the River Weser?

A. Yes; we have already towed several docks down and I take part in all the trial trips.

[fol. 247] Cross-examination.

By Mr. Jones:

634 Q. In forming your opinion that the rudder was straight, did you arrive at that opinion by looking at the rudder or by measuring it with some instrument?

A. I saw that myself, in the presence of the foreman and the other men.

635 Q. Did either the foreman or anyone else take any measurements to see if the rudder was straight?

A. We did not measure the rudder to find out if it is straight or not.

636 Q. In other words, you took no measurements, but merely looked at the rudder?

A. We undertook no measurements.

637 Q. And you formed your opinion that the rudder was straight by looking at it with your eye?

A. One must look at it and one must see it.

638 Q. But the question I put to you is that you relied solely upon your eye to determine whether or not the rudder was straight.

A. Yes.

639 Q. Can you refer me to a single vessel, giving her name, which was towed up or down the River Weser when her rudder was damaged?

A. No.

640 Q. It was quite possible for you to repair the rudder of the "Isis" at Bremen, was it not?

A. Yes; but it would have required a fair amount of time.

(The witness withdrew.)

JOHN WÜHRMANN, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

641 Q. What is your name?

A. John Wührmann.

[fol. 248] 642 Q. (Through the Interpreter:) What is your occupation?

A. (Through the Interpreter:) Dock Inspector.

643 Q. Inspector of what Docks?

A. All the floating docks of the Actiengesellschaft Weser.

644 Q. Did you hold that position in 1928?

A. Yes.

645 Q. Do you remember the steamer "Isis" being there in February, 1928, in one of your docks?

A. Yes.

646 Q. Did you examine her rudder?

A. No, I left that to the engineers but I was up in the pontoon and I saw her coming in.

647 Q. Did you see her rudder when she got into dry dock?

A. Yes.

648 Q. State in what condition the blade and the stem were?

A. So far as you could see the blade was all right.

649 Q. How about the stem?

A. As I understood, the stem was twisted right at the top.

650 Q. What was done to lash the rudder?

A. They put the rudder amidships and they set it fast on the quadrant with the screws, and they put two lines from the rudder to the sides and took them round the winches and made the rudder fast.

651 Q. Did you see that work done?

A. I saw the wire from the rudder—I looked down from the deck and I saw it—and I saw the rudder fastened in the quadrant room.

652 Q. When they had finished, how did the rudder stand—was it amidships or not?

A. Yes, it was right amidships.

653 Q. Before you had your present position, had you been to sea?

A. I was at sea from 1891 to 1904.

[fol. 249] 654 Q. Were you captain?

A. I was captain for 10 years.

655 Q. Of sailing ships or steamers?

A. On big sailing ships.

656 Q. Have you had any experience of vessels being towed up and down the River Weser?

A. I have been at the Actiengesellschaft Weser since 1904. Do you mean for towing vessels up and down the River Weser?

657 Q. Yes.

A. I know about towing floating docks up and down the River Weser.

658 Q. And steamers?

A. I know that there were some steamers towed up and down from Bremerhaven when they came to our yard to have machinery put in them.

659 Q. Do you know whether they tow by night as well as by day?

A. Yes, I should say so. Why not?

660 Q. Do they tow with the current or against the current?

A. You see, they have to take the tide; but still, they were towing at night-time as well.

661 Q. (Through the Interpreter:) And with the current or against the current?

A. Well, that may be against the tide—you see, it all depends.

662 Q. (Through the Interpreter:) Were you present when a discussion took place as to whether to tow the "Isis" down the river?

A. Yes.

663 Q. What was your opinion as to whether or not it was safe to tow her, or whether she was seaworthy to be towed down the river with her rudder lashed, and with the assistance of three tugs and her own engines?

A. My opinion is this, that first it was a twin screw boat and they could use the engines; they had a big tug on the bow, the "Hoheweg", one of the salvage boats, and there were two other boats, one on each side aft, and they were [fol. 250] very powerful boats—they were the "Eversand" and the "Lankenau".

664 Q. And in your judgment, with these tugs and her engines, was she seaworthy to make that trip?

A. Yes.

Cross-examination.

By Mr. Jones:

665 Q. You were a member of the Court of Admiralty at Bremerhaven which held an investigation on the 24th March, 1928, into this accident to the "Isis", were you not?

A. I can remember most of it, but it is some time ago.

666 Q. You were a member of the Court?

A. Yes.

667 Q. And you signed the proceedings of the Court, did you not?

A. Yes.

668 Q. And you agreed to the findings of the Court, did you not?

A. Yes.

669 Q. I ask you to read this paper and to tell me whether it is a correct translation of the findings of the Court.

(Same handed to witness.)

670 Mr. Griffin: How can he remember, without the original document in front of him?

671 Mr. Jones: You can remember what your conclusions at the time were, can you not?

(The witness read through the English translation.)

672 Q. (Through the Interpreter:) You have read the document I have shown you, and I ask you whether or not that document accurately states the judgment of the Court of which you were a member?

A. (Through the Interpreter:) According to my opinion, yes. I have not got a perfect knowledge of the English [fol. 251] language, but according to what knowledge I have, it is a correct statement. I can follow the whole of it.

673 Q. (Through the Interpreter:) You joined with the other members of the Court in reaching the conclusion?

A. Yes.

674 Q. And your conclusion was that the accident was due to the fact "that on that day an exceptionally strong tide current caught the vessel at the port bow while her steering capacity was limited"; is that not correct?

675 Mr. Griffin: I object to any question attempting to show what the findings of the Court, known as the Seeamt, were, by questioning this witness, or in any other way, on the ground that the findings of that Court are irrelevant and immaterial to the question in this case.

676 Mr. Jones: I intend to show that the findings of this witness in March of 1928 were directly contrary to the evidence which he has given here.

677 Q. Now will you tell me what is the answer to the question?

A. I should have gone with the steamer any time.

678 Mr. Jones: I move to strike out the latter part of the answer as being unresponsive.

679 Q. (Through the Interpreter:) Is it not a fact that Captain Kruger admitted to you, while you were a member of the Court, that "the vessel tended during the entire passage to swing toward starboard, although the maneuvers of the two tugs were supported by the engines of the 'Isis'"?

[fol. 252] 680 Mr. Griffin: I object on the grounds already stated, and further on the ground that that is not a proper method of cross examination, and on the further ground that any such statements appearing in the document referred to are without one word of support in the evidence taken before that Court and are directly contrary to the Captain's statement.

681 Mr. Jones: What is the answer to my question?

A. (Through the Interpreter:) I do not remember it in detail. To where does this refer?

682 Q. (Through the Interpreter:) This appears from your decision which you signed. In that decision which you signed you said, with the other members of the Court: "According to the statements of several witnesses, particularly according to the declaration of Captain Kruger, the vessel tended during the entire passage to swing toward starboard although the maneuvers of the two tugs were supported by the engines of the S. S. 'Isis'." That is the statement you made over your own signature, and I ask you if Captain Kruger did not make that statement?

A. (Through the Interpreter:) What I stated at the Marine Court is correct; but I cannot at the moment say whether the translation gives the true facts. What I said at the Court is true.

683 Q. (Through the Interpreter:) Is it not also true that you expressed the opinion, as a member of the Court at Bremerhaven, that it would have been better if the vessel had started the voyage in the day time and accomplished the entire passage during the day time?

[fol. 253] 684 Mr. Griffin: I make the same objection.

685 Mr. Jones: What is the answer?

A. (Through the Interpreter:) We had to reckon with the tide, and there was nothing in the way of doing it. It was good weather, and so far as I know there was a lot of light on the river.

686 Mr. Jones: I move that the answer be struck out as unresponsive, and to ask the witness to answer the question which I put to him.

687 Q. (Through the Interpreter:) Is it not also true that you expressed the opinion, as a member of the Court

at Bremerhaven, that it would have been better if the vessel had started the voyage in the day time and accomplished the entire passage during the day time?

A. (Through the Interpreter:) I did not say so. Does it say in the report that I did say so?

688 Q. Yes. (Report handed to witness.)

A. (Through the Interpreter:) The whole Court said that it would have been better? But if the pilot and the captain say it can be done, it can. (Not through the Interpreter:) We may have mentioned that but the pilot may have said the captain can go, so it would have been all right.

689 Q. (Through the Interpreter:) Do you agree with the statement you have just read?

A. (Through the Interpreter:) Yes, what I have said in German is correct, and if this is a correct translation of the German, this also is correct.

690 Q. (Through the Interpreter:) And did you not also express the opinion: "in taking a vessel handicapped to [fol. 254] some extent the risk always existing is naturally much less while proceeding with daylight than at night"?

A. (Through the Interpreter:) That is evident. The pilots go by day and by night, and they have to depend upon the tide.

691 Q. (Through the Interpreter:) Then you also expressed the following opinion: "It is also open to blame that Captain Kruger did not insist on seeing the certificate of seaworthiness before he started on his voyage, because according to paragraph 513 of the Code of Commerce he is responsible for it that the vessel starts her voyage in a seaworthy condition. Whether such a certificate of seaworthiness existed at all, and in what form, could not properly be found out at the Court proceedings, as has already been explained."

A. (Through the Interpreter:) That is correct.

692 Q. What I have read is quite correct?

A. Yes. But these are not matters for us; these are matters for the captain.

693 Q. Then you also expressed the following view: "It must be borne in mind that the steering capacity of the entire flotilla was naturally curtailed, firstly because there was relatively little water under the keel and then because the four vessels connected with each other formed a unit

and developed only a slow speed. Furthermore, during the passage from Bremen to Vegesack the S. S. 'Isis' evidently tended to swing to starboard. Apparently the master did not notice this swinging to starboard because the bend of the fairway was at first in the same direction. Witness Captain Zey, master of the tug 'Eversand', has testified that he did not at all notice this swinging to starboard of the S. S. 'Isis'. The Admiralty Court does not connect this [fol. 255] swinging of the vessel with the fact that later, when docking the vessel, it was found that the back pieces of the rudder stood a few degrees to starboard. As it appears from the testimony of witnesses that the S. S. 'Isis' left the dock of the Weser Company Limited with the rudder well secured and standing at a right angles, it is to be supposed that the twist in the rudder was caused only through the grounding at Vegesack." Then you went on: "After passing the Lesum beacon, the river bends to the west so that it is necessary to alter the course to port. In spite of all the engine maneuvers of the S. S. 'Isis' herself, and the corresponding maneuvers of the tugs, it was not possible to get the steamer on her proper course. This must be attributed to the fact, as already explained, that it was very *difficult to make* the S. S. 'Isis' swing to port and that she was caught by the north-west wind prevailing on the day of the accident and the particularly heavy flood tide on that day, and thus ran aground with her bow. As the S. S. 'Isis' was fast immediately before the mouth of the Lesum, and part of the tide current flows into the Lesum, and this, according to the statement of the expert witness Plate, Director of Navigable Waters, with far greater velocity than the tide current flowing up the River Weser, it was but natural that the S. S. 'Isis' was driven before the mouth of the Lesum." That was your opinion, was it not?

A. Yes.

694 Q. Then you went on: "No fault attaches to the master for this accident, either. It must be attributed to the co-incidence of several unfavorable circumstances—limited steering capacity of the vessel, strong wind coming almost from athwart and an exceptionally strong tide cur- [fol. 256] rent running against the vessel at an unfavorable site." That is correct, is it not?

A. Yes.

695 Mr. Jones: I tender the entire document in evidence, and ask for it to be marked "Exhibit B".

696 Mr. Griffin: I object to the document as incompetent, irrelevant and immaterial, and further on the ground that no determination of the Court known as the Seeamt has any bearing upon the issues in this case, nor is it proper to be considered by the Court.

(The document was marked "Libellant's Exhibit B".)

697 Mr. Jones: Do you know the signature of the gentleman who signed this paper that I hand to you, Libellant's Exhibit A?

(Same handed to witness.)

A. Yes.

698 Q. Who is he?

A. He is the Secretary of the Seeamt.

699 Q. (Through the Interpreter:) And documents under his signature may be accepted as correct?

A. Yes.

700 Q. Then you are prepared to testify that this is a correct copy of the testimony taken before the Seeamt when you signed as a member of that Court?

A. (Through the Interpreter:) I cannot say without reading the whole thing, because it is only a copy of the original. I must read the whole of the original. But I recognize it as true.

[fol. 257] 701 Mr. Jones: Then we offer Exhibit A in evidence.

702 Mr. Griffin: I make the same objections as before.

Redirect examination.

By Mr. Griffin:

703 Mr. Griffin: The following questions are asked without prejudice to the objections hereinbefore taken.

704 Mr. Jones: If the questions are asked I shall again offer the document in evidence, as the questions — with respect to the other passages of the opinion of the Court and not in the nature of rebuttal to the facts which I have brought out, but an examination of the witness by Counsel for the Respondent on his own account entitles me to offer the entire document.

705 Mr. Griffin (Through the Interpreter): Mr. Jones has read you some passages from this document Exhibit B, and has asked you whether they are correct. Now I am going to read you some other passages and ask you whether the passages which I read were also the findings of the Court. Now, will you follow me and see if I read the findings of the Court correctly.

A. (Through the Interpreter:) It is rather difficult for me to follow it all in English and I cannot follow such long sentences.

706 Q. (Through the Interpreter:) "Nor can the master and officers be reproached for having started the voyage of the S. S. 'Isis' while her steering capacity was limited. [fol. 258] There did not exist any defects in the ship's equipment or in the fairway. The measures taken after the accident was adequate." Is that correct as a finding of the Court?

A. Yes.

707 Q. And this also appears on pages 3: "After the rudder had been laid well at right angles, the set screw (brake) had been tightened and the back pieces had been lashed with the rudder pendants, the vessel started on February 10th at 1:30 A. M. on her voyage to Hamburg." Is that also correctly part of the Court's findings?

A. Yes, we set the rudder blade amidships.

708 Q. Now I ask you the same question as regards this passage on page 7: "As to the second accident, it had to be examined first whether the Master was open to a reproach because he started the voyage with a vessel considerably handicapped in her steering capacity due to the existing damage to the rudder. This must be answered in the negative, in the opinion of the Admiralty Court. The motor ship 'Isis' has twin propellers which fact alone gives a certain steering capacity to a vessel with a damaged rudder. In addition to this, the Master had engaged three tugs developing altogether about 2,700 h. p. Of these tugs the strongest, that is the tug 'Hoheweg', developing 1,080 h. p., had made fast to the bow where the strongest tug was needed, while the other two tugs were properly moored to both sides of the vessel. It must be admitted therefore that no fault was committed with regard to the number and the power of the tugs." Was that the finding of the Court, as I read it?

A. Yes.

709 Q. And one more passage on page 7: "There should have been no hesitation in starting the voyage with a ves-[fol. 259] sel so equipped and aided. It may be pointed out that flotilla tows disposing of much less steering and motion capacity, navigate the river Weser without endangering navigation or themselves, for instance, pontoons, cranes, etc., which have no engine of their own. There is nothing extraordinary in starting such voyages and it can never be avoided." Is that also a correct statement of the finding of the Court?

A. Yes.

710 Mr. Jones: I re-offer Exhibit B on the ground that it has been made the subject of examination by Counsel for the Respondent.

711 Mr. Griffin: I object on the same grounds previously stated, and I further state that, since there is present no judge who could rule on my objection when originally made, I was entitled to examine with respect to the document, without prejudice to my objection, in order to cover the contingency that the Court might overrule the objection. I still insist that the examination, as stated before beginning it, was without prejudice to my objections.

712 Mr. Jones: Then I will proceed to ask some further questions.

Recross-examination.

By Mr. Jones:

713 Q. You also found as follows: "The investigation showed that the rudder, although lying well in the middle, had the back pieces and the main piece twisted toward each other. On instructions received from the head office, the Master decided to proceed to Hamburg with the assistance of tugs. The Inspectors of the Shipowners who were pres-[fol. 260] ent at Bremen had told Captain Kruger that the Germanic Lloyd had issued a certificate of seaworthiness, but this certificate of seaworthiness was not submitted to him. The proceedings before the Admiralty Court have not shown whether it really existed." Is that statement correct?

A. Yes.

(Adjourned to tomorrow.)

Second Day

Hamburg,
Friday, 15th August, 1930.

714 Mr. Griffin: It is agreed between Counsel as follows: That the document heretofore marked "Exhibit A" is a correct copy of the record made in the Seeamt of the evidence given in their investigation.

It is further agreed that the Seeamt is not a Court for the determination of litigated controversies, but is a body created to investigate marine disasters with certain disciplinary powers.

ERNST SAXE, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

715 Q. Will you state your full name?

A. Ernst Saxe.

716 Q. What is your present occupation?

A. I am Inspector with the Unterweser Reederi Aktiengesellschaft.

[fol. 261] 717 Q. How long have you held that position?

A. I have held that position now for seven years.

718 Q. Where is that Company located?

A. In Bremen.

719 Q. What, in general, are your duties in that position?

A. My duties are to direct the tugs in the work they have to do.

720 Q. Does the Company do towage work?

A. Yes.

721 Q. Does it do any salvage work?

A. Yes.

722 Q. What relation have you to the salvage work?

A. I am also the Salvage Inspector of the Company.

723 Q. By "Inspector", what do you mean?

A. The Salvage Officer; we call it "Inspector" in Germany.

724 Q. Does that mean that you have the direction of the salvage?

A. Yes.

725 Q. And of the towage?
A. Yes.
726 Q. Have you had experience of Master of tugs?
A. Yes.
727 Q. Where?
A. In that Company.
728 Q. And on what waters?
A. On the Weser.
729 Q. Has your work chiefly been on the River Weser?
A. Yes, generally on the Weser.
730 Q. How long were you Master of Tugs on the Weser?
A. About two years and a half—it might be a little bit more.
731 Q. Before that were you Mate?
A. Yes, about a year.
732 Q. Before that were you at sea?
A. Yes.
733 Q. For how many years?
A. From 1906 until 1914.
734 Q. Have you had experience in the towage of steamers which are disabled, on the different rivers of Germany?
A. Yes, especially on the Weser.
[fol. 262] 735 Q. Have you any particular cases of that kind to which you can refer?
A. The "Nawtika". She was towed from Bremen to Bremerhaven last year. I could not say the exact month but it was last year, shortly after the steamer "Bremen" was finished. She was towed from Bremen to Bremerhaven without steam and without a rudder.
736 Q. How large a ship was she?
A. I could not say exactly, but I should say between 4,000 and 5,000 tons.
737 Q. Did you tow her from Bremerhaven to Bremen?
A. No; she was towed by the North German Lloyd from Bremerhaven to Bremen and we towed her back from Bremen to Bremerhaven.
738 Q. How many tugs did you use?
A. Three.
739 Q. What was the power of the three tugs?
A. The three tugs that towed that ship were about 2,400 horse power.
740 Q. You say she had no steam and no rudder?
A. Yes.

741 Q. Have you another case of the "J. Cartier"?

A. Yes; the "J. Cartier" was towed from Vegesack to Bremen by our tugs.

742 Q. How many tugs?

A. Three of them.

743 Q. How large a ship is she?

A. She is a ship of about 9,800 tons.

744 Q. Did she have steam?

A. No, she had no steam.

745 Q. Do you know whether she had a rudder or not?

A. I could not say if she had a rudder; I think she did but I could not say for certain.

746 Q. You say that there were three tugs?

A. Yes.

747 Q. How powerful were they?

A. One tug would be about 1,000 horse power, and the other two would be about 800 horse power each.

[fol. 263] 748 Q. Do you remember any case of a ship with a damaged rudder?

A. Yes, the Neptune motor ship "Bessel".

749 Q. How large a ship was she?

A. About 1,800 tons.

750 Q. How was her rudder at that time?

A. Her rudder was damaged; they could not use her rudder.

751 Q. How many tugs did you use?

A. One tug brought her up to Bremen from Bremerhaven.

752 Q. What tug was that?

A. The "Hoheweg".

753 Q. And they brought her from where?

A. From Hoheweg to Bremen.

754 Q. Where is Hoheweg?

A. It is half way from Bremerhaven down towards the sea.

755 Q. Have you had any experience with the Rickmer ships?

A. Yes, they used to be built in Bremerhaven and brought up to Bremen to get their engines put in them.

756 Q. How large ships were they?

A. They would be ships carrying between 3,000 and 4,000 tons.

757 Q. How many tugs were used with them?

A. Three.

758 Q. How powerful tugs?

A. At that time our tugs were not so powerful; we had tugs about 250 to 400 horse power.

759 Q. Have you yourself often towed on the River Weser?

A. Yes.

760 Q. In this case, the steamer "Isis", do you know the steamer?

A. Yes, I know her.

761 Q. She is about 4,500 tons with a part cargo, and she was towed from Bremen bound for Hamburg by three tugs, the "Hoheweg", the "Eversand" and the "Lankenau". Do you know those tugs?

A. Yes.

762 Q. She started at about 1 o'clock in the morning at [fol. 264] the beginning of flood tide, her engines were in good order and she had twin screws, and she was in charge of a Bremen pilot. Will you state your opinion, based on your experience, as to whether the ship was seaworthy and whether it was safe to take her on that trip in that way—I should have added that her rudder had been damaged and was lashed amidships.

763 Mr. Jones: I object to that question because it incorrectly states the facts, because it was stated that the vessel had only part cargo, when she had full cargo with the exception of 400 tons.

764 Mr. Griffin: She had about three-quarters of her cargo.

765 Mr. Jones: I again object to the question.

766 Mr. Griffin: What is your opinion?

A. My opinion is that, with a ship of that size, three tugs, one ahead and one on each side astern, were quite sufficient to carry on with the ship.

767 Q. With her own engines working also?

A. Yes. Starting there at night-time with a flood tide, I cannot see anything in it—nothing should happen to the ship because she had her own engines, and the three tugs were strong enough for the size of that ship. I cannot see any reason why they should not do it.

768 Q. Is there any objection to towing at night?

A. None at all.

769 Q. Is there more or less traffic in the river at night?

A. There would not be much difference; the only thing there could be is that there are not so many lighters being [fol. 265] towed at night-time. But I do not think there is much difference in the traffic between day and night because ships come and go. Whenever they are ready to go, they go.

770 Q. But large ships go by night as well as by day?

A. Yes.

771 Q. And the lighters go more by day?

A. Yes, whenever possible; but sometimes they go by night also.

772 Q. What is the proper state of the tide to start on such a trip?

A. The proper state is to go away with the flood tide as soon as the flood starts.

Cross-examination.

By Mr. Jones:

773 Q. What is the depth of the water in the River Weser?

A. At low water it would be between 11 and 12 meters at Bremen.

774 Q. Does the depth vary as one goes down the river, or is it constant?

A. Do you mean whether it rises or falls?

775 Q. No; is the depth of the water throughout the channel the same, or does it change at various places in the river?

A. It changes.

776 Q. What is the least depth you would find in the river?

A. The least depth is at a place a little bit below Farge.

777 Q. What is the depth of the water there?

A. The depth of the water there would be a little above 20 feet at normal low water.

778 Q. What is the depth at high tide?

A. It rises or falls about three meters there; it may be a little more or a little less, but somewhere about three meters.

779 Q. So the extreme depth of the water at high tide [fol. 266] at the place you have just referred to, is about 29 feet?

A. 28 to 30 feet.

780 Q. Varying according to the tide?

A. Yes.

781 Q. Are there other places in the river which are as shallow as that?

A. That is the shallowest place, and that is why the ships always go away from Bremen at low water so as to pass this place at high tide.

782 Q. So it is the custom of ships to leave Bremen at low water so as to pass that place at high tide.

A. Yes.

783 Q. How long before the tide actually begins to run flood is it low water at Bremen?

A. It all depends; it is generally about half an hour before that that the tide sets in—before the tide properly starts coming in the water has already started to rise.

784 Q. How long before the tide begins to run does the water begin to rise?

A. I do not quite understand.

785 Q. I did not understand you. I understood you to say that the water begins to rise at Bremen before the current begins to set in?

A. Yes.

786 Q. How long before the current begins to set in does the water begin to rise?

A. As I said, about half an hour—it may be a little bit more.

787 Q. I understand you to say that big ships leave Bremen before the tidal current begins to set in at Bremen?

A. No. When the tide sets in at low water, then ships with a big draught leave Bremen.

788 Q. As soon as the tide begins to set in?

A. Yes.

789 Q. And they do not wait after that?

A. No.

[fol. 267] 790 Q. If they wait an hour or so after that it means that when they get down to this place Farge, where there is very little water, they may have trouble?

A. Yes, that is correct.

791 Q. The Weser River is a winding river, is it not?

A. Yes.

792 Q. It has many sharp bends in it?

A. No; the sharp bend has been corrected this last few years.

793 Q. What was the condition in 1928—were there bends in the river at that time?

A. Yes.

794 Q. Can you give me some idea of how much of a bend there was at that time, expressing yourself in degrees of a circle so that I can form some idea of the sharpness of the bend?

A. When you leave the harbor the sharpest bend is just outside the harbor, which may be a bend of 35 degrees.

795 Mr. Griffin: When you say "harbor", do you mean Bremen Harbor?

A. Yes, just when you get outside Bremen Harbor; at that time there was a bend, but now they have corrected that bend. First of all it was about 35 degrees.

796 Mr. Jones: That is not corrected now, is it?

A. Yes, they have corrected it now.

797 Q. But in 1928 it was not corrected?

A. No.

798 Q. What is the next bend going down the river?

A. The next place is a place just a little bit below the Industrial Harbor.

799 Q. How much of a bend is that?

A. It may be a bend of a few degrees more.

800 Q. That is a bend of more than 35 degrees?

A. Yes.

[fol. 268] 801 Q. It is what you would call a sharp bend?

A. Yes.

802 Q. What is the next sharp bend?

A. The next sharp bend is at Vegesack.

803 Q. How much of a bend is that?

A. It would be a bend of about 50 to 60 degrees, taking it on the whole.

804 Q. That is a very sharp bend?

A. It is the sharpest bend in the river.

805 Q. How near is Vegesack to where the River Lesum comes into the River Weser?

A. That is it.

806 Q. Where the Lesum comes into the river is the shallowest part of the river, and also the place where there is the sharpest bend——

807 Mr. Griffin: I object to the statement that it is the shallowest part of the river, because he did not say that.

808 Mr. Jones: Yes, he did.

809 Q. It is the shallowest part, is it not?

A. There is a sharp bend there.

810 Q. And there is a shallow part of the river there, too?

A. No, not there. I could not say how many kilometers it is, but it is at least 10 kilometers to the place where this shallow place is.

811 Q. At any rate the common practice in Bremen is, when a ship is coming down the river, and going round these bends and going over these shallows, to leave at low water just as the tidal current begins to run in, and not wait until the current has been running in for an hour or more?

A. Yes.

812 Q. That is the common practice?

A. Yes.

813 Q. It is very unwise to wait until the current has [fol. 269] been running in for an hour or so?

A. That is not necessary.

814 Q. It is considered unsafe to wait until then?

A. Yes, it is unsafe.

815 Q. Was this steamer, the "Nawitka", towed in the day-time or at night-time?

A. She was towed during the day.

816 Q. And was the steamer "J. Cartier" towed in the day or in the night?

A. She was towed during the day also.

817 Q. Was the steamer "Bessel" towed in the day or in the night?

A. She was towed early in the morning.

818 Q. In daylight?

A. Yes.

819 Q. And the Rickmer steamers were small ships?

A. Yes.

820 Q. And they had no cargo—there was just the hull being towed to have the engines put in?

A. Yes.

821 Q. They were not loaded ships?

A. No.

822 Q. As I take it, you have been unable to cite us any case where a loaded ship was towed in the River Weser when the vessel had no rudder and was unable to use her rudder for steerage purposes at night-time?

A. No.

823 Q. You know of no such case?

A. No, I do not remember a case.

824 Q. You would not suggest that it is as safe to proceed down the River Weser with tugs when the ship's rudder is useless, as it is when the ship's rudder can be used?

A. I do not quite follow you.

825 Q. You would not suggest that it is as safe to proceed down the River Weser with a vessel whose rudder is useless, as it is with a vessel whose rudder can be used?

A. If that vessel has got enough tugs to assist it, to my [fol. 270] idea it is just as safe to proceed with a vessel like that as with a vessel which has its own rudder, because these tugs are made tightly fast alongside and they act the same as a rudder on the vessel.

826 Q. You do not mean to suggest that you would as soon have a vessel without a rudder as you would have a vessel with a rudder, do you?

A. If I had got enough tug power to do work like that, then it does not matter to me whether the ship has got a rudder or not. If I have got tug power, naturally I would do it at any time.

827 Q. When proceeding with tugs you have, of course to proceed more slowly than you do when a vessel is proceeding with all power; that is true, is it not?

A. Yes.

828 Q. And the tide element, to which you have referred, and the taking of these bends and the going over the shallows, are of much more importance when you are proceeding with tugs than when you are proceeding under your own power, because you go much more slowly when you are proceeding with tugs?

A. I do not know. I have just said that if I have got tugs for a ship and the ship has got no rudder. I do not see an objections to it. I can carry on with it, and I would carry on with it. But, as you said, a ship with a rudder is better than a ship without a rudder; there is no doubt about that. But still, when I have got enough tug power to assist me I do not see any danger in going away with a ship like that at any time.

829 Q. But you have never done it at night time?

A. No, but I do not see that I could not do it at night time.

830 Q. Have you ever known anyone else do it at night time?

A. Yes.

[fol. 271] 831 Q. What ship, with a rudder out of commission, has ever been towed down from Bremen at night time?

A. Not Bremen, but from other places they have done things like that.

832 Q. But you cannot tell me a single case at Bremen where it has ever been done at night time?

A. No, I could not mention a similar case where it has been done at night time, if you want it that way.

833 Q. And it is always safer to have a ship with a rudder than one with no rudder—you will concede that, will you?

A. Yes, I can see that. If I have a ship with a rudder it is all right, but if I have a ship without a rudder, and I have enough tugs and they are strong enough I do not see any danger in carrying on with a ship like that.

834 Q. But you are taking more chance with a ship without a rudder than you are with a ship with a rudder?

A. No; every day we tow ships in Bremen from the Industrial Harbor without their own engines and if you come to look at it it is very seldom that anything ever happens.

835 Q. But that is only a matter of towing a vessel in the river from one place to another?

A. Yes.

836 Q. For what distance would you be in the River?

A. Perhaps for two kilometers. But in fact things happen more to ships when they have got their own engines than when they have not got their own engines.

837 Q. There are no sharp bends in Bremen, are there?

A. They are sharper there; a ship comes out of the docks like that (describing) and has to take a sharp bend to get around the pierhead, and coming out of one harbor to get into another I have to pass ships and make sharp turns.

[fol. 272] 838 Q. But you are only shifting a few kilometers from one berth to another?

A. No, we are shifting from one harbor to another.

839 Q. What you mean to say is that you are coming out of one harbor basin and going into another harbor basin, all in the City of Bremen, and that is what you are referring to now?

A. Yes, I am referring to that, and I am also referring to part of the river.

840 Q. And you are in the river for two kilometers at most?

A. Yes.

841 Q. What is the distance from Bremen to Bremerhaven?

A. 36 miles.

842 Q. How many kilometers is that?

A. About 60, odd.

843 Q. You do not mean to say that you would compare a towage of two kilometers with one of 60 kilometers?

A. If I can tow a ship well for two kilometers, why cannot I tow it for 60 kilometers?

844 Q. If other witnesses suggested that in towing at night time it was more difficult to observe the effects of tidal currents than in the day time, would you agree with that?

A. No; I have got leading lights on both sides of the river; every 500 meters. These lights are standing, so, that I can go along there just the same at night as I can along the street.

845 Q. By "leading lights" you mean buoys?

A. No, leading lights standing ashore.

846 Q. Do you mean to say that you can see the currents at night time as well as you can in the day time—I mean the effect of the currents?

A. No, you cannot.

847 Q. You can see it better in the day time?

A. Yes. You may be able to see how strong the current is running; but how the current is running you cannot see [fol. 273] in the day time and you cannot see at night time. When you pass the buoys you can see how strong the current is running but you cannot see how the current is running when you are passing a ship there.

848 Q. But the thing is that in the day time you can see the effect of the current better than you can see it at night time. Is that not true?

A. The current in the river—the river being very narrow there—can run round the bends in one way when it is flooding.

849 Q. Round the bends the currents run in various ways, do they not?

A. Yes.

850 Q. And going round the bends in the day time you can see the direction and the strength of the current much better than you can at night time?

A. That may be true; I do not doubt it.

Redirect examination.

By Mr. Griffin:

851 Q. On this particular night, the evidence is that there was moonlight.

A. Yes.

852 Q. If you have a moonlight night, with the aids to navigation which there are in the River Weser, do you see any danger in taking a ship down at night?

A. None at all. I would take the risk of it and do it every day. We have done it often enough, but not as Mr. Jones says, at night time, but if we can do it in the day time, as we have any amount of leading lights and gas buoys, then it is all right to do it at night time.

853 Mr. Jones: His testimony is confused there. I understood him to say that he had done it in the day time, but that he had never done it at night time.

[fol. 274] A. Personally I have never done it at night time.

854 Mr. Griffin: Has your Company done it at night time?

A. I do not know, I am sure; but there are sure to be things like that. If you leave Bremen going to Bremerhaven you cannot always fix it so that you get there in the day time.

855 Q. You said in answer to Mr. Jones that if the steamer had enough tugs and powerful enough tugs, you thought she would be perfectly safe.

A. Yes.

856 Q. With the three tugs that I have named, do you think that she had enough tugs and powerful enough tugs?

A. Yes.

857 Q. And enough power?

A. Yes. Besides, that ship had her own engines. These tugs would have been enough, even if she had not had her own engines.

858 Q. But if she had her own engines and the engines of the tug, she could make faster speed than if she had the tugs only?

A. Yes, she could have made a faster speed.

Recross-examination.

By Mr. Jones:

859 Mr. Jones: I call for the production of the abstract of the engine room log book which is referred to in the report of the Seeamt.

860 Mr. Griffin: I will have enquiries made for it.

861 Mr. Jones: If you are towing a vessel with no rudder and it is necessary to use one of the engines of the vessel more than the other engine, the vessel being a twin [fol. 275] screw steamer, it shows that the vessel was showing a tendency to go off to one side, thus making it necessary to use one engine more than the other, does it not?

A. I should say that if they used one engine more than another, there might be a tendency for the ship to go the other way. It might be that one tug was a little bit astern, or there might be a little wind; I do not know.

862 Q. That shows a tendency of the ship to go off, if they had to use one engine more than another.

A. No, because if you are taking a bend you naturally stop one engine and let the other one go a little bit faster.

Further redirect examination.

By Mr. Griffin:

863 Q. In rounding a bend you would use one engine more than another, would you not?

A. Yes.

(The witness withdrew.)

Christen Thiessen, called as a witness on behalf of the Respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

864 Q. Will you give your full name?

A. My full name is Christen Thiessen.

865 Q. What has been your business for the last 25 years?

A. About 25 or 26 years ago I retired from seafaring, and I was Captain of a sailing vessel for about ten years before.

[fol. 276] 866 Q. You retired about 1904 or 1905?

A. Yes, in January.

867 Q. What have you been doing since then?

A. In April, 1905, I entered into a towage and salvage business here; they called it at that time Vereinigte Bugsier & Frachtschiffahrts-Gesellschaft.

868 Q. You were connected with that Company until when?

A. I retired in November, 1926.

869 Q. During those 21 years what was your position with that Company?

A. I was Superintendent until 1911.

870 Q. And after that?

A. Then I advanced to Director; there were two Directors of that firm.

871 Q. Do you say that the business of that Company was towage and salvage?

A. The business of that Company was cargo boats, and one department was towage and salvage, and I was the Manager of the Towage and Salvage Department.

872 Q. In that position did you have the direction of the tugs and vessels engaged in towage and salvage?

A. Yes, I disposed of the whole of it.

873 Q. Was it part of your duty to make arrangements for towage?

A. Yes.

874 Q. And decide how many tugs to use?

A. Yes.

875 Q. Do you cover various rivers in Germany, the Elbe, and so on?

A. Yes, not only the whole coast of Germany, but especially the North Sea and all the rivers and harbors connected with the North Sea trade and the Baltic, and sometimes down to the Mediterranean also.

876 Q. You said that when you were at sea you were Captain on sailing vessels?

A. Yes.

877 Q. Were you ever on steamers?

A. Not as a Captain, but as an Officer.

[fol. 277] 878 Q. What sort of steamers?

A. I have been on liners in the Hamburg-Calcutta Line; but that line has been extinct for a number of years.

879 Q. And on cargo steamers, too?

A. Yes, liners and cargo steamers, and I have also been on small craft in the North Sea—especially in the North Sea and Baltic—for a few years.

880 Q. The steamer "Isis" was about 4,500 tons with about three-quarters of her total cargo in her, the rudder was damaged and was lashed amidships. She left Bremen at night at about the beginning of the flood tide with three tugs, the "Hoheweg" of about 1,080 h. p., the "Eversand", of about 800 h. p., and the "Lankenau" of about 800 h. p., one tug ahead and the other two on the two sides aft, the "Hoheweg" being the leading tug. The engines of the "Isis" were in good condition and she had twin screws. Will you state whether or not, in your opinion she was seaworthy and safe to make the trip from Bremen to Hamburg in that way?

881 Mr. Jones: I object on the ground that the question does not fully state the facts, and the witness has not been shown competent to answer the question with regard to the seaworthiness or the general safety of the voyage.

882 Mr. Griffin: Now will you give us your opinion as to whether the ship was safe and seaworthy?

A. I do not quite catch the circumstances. I understand that there were three tugs.

883 Q. Yes.

A. Which tug was ahead?

884 Q. The "Hoheweg", the strongest one, was ahead, and that is a tug of 1,080 h. p., and there was one tug on [fol. 278] each side aft, and each was about 800 h. p.

A. In my opinion that is absolutely sufficient.

885 Q. Would you consider the ship safe and seaworthy for that trip?

A. Yes.

886 Mr. Jones: I object to that, because the witness does not know anything about the condition of the ship.

887 Mr. Griffin: What experience have you had in towing ships which had been disabled or partly disabled—can you give us any particular cases?

A. During my activities and experience we have had a good many vessels, steamers, and, previously, sailing vessels, which were towed while in distress, or because the steering gear, perhaps, was not in order, or because the propeller or machinery was not in order.

888 Q. Can you give me some particular cases, you can refer to your notes if you want to.

A. In our opinion, what was a very hard task was the towing of the great floating docks. Formerly, I myself have been on board to manage the whole thing, but I have not been a Captain of a tug boat myself.

889 Q. Tell us first about these docks that you refer to. Do you mean a dry dock?

A. Yes, a floating dock.

890 Q. How large?

A. We have had one of 11,000 tons, and one I remember of 15,000 or 18,000 tons.

891 Q. Tell us about the 11,000 tons one.

A. That was towed from Stettin via the Skaw, to Ham- [fol. 279] burg—it did not go through the Kiel Canal, because it was too big.

892 Q. How did she go?

A. We had three tugs at that time.

893 Q. Of what power?

A. The tugs we had at that time were not so powerful as the new tugs are. As far as I remember, it was three tugs of about 650 h. p. each.

894 Q. Was that dock towed in rivers?

A. Yes, from Stettin it goes down through the Channel to Swinemunde and at Swinemunde you get into the open sea. Then again it was towed from the open sea into the River Elbe past Cuxhaven and right up to the City of Hamburg.

895 Q. You spoke of another dock of about 15,000 to 18,000 tons. Where was that towed?

A. I believe that that was towed from Flensburg.

896 Q. Where was that towed to?

A. It was toward here, to Hamburg, and round the Skaw also, because it was too big to go through the Kiel Canal.

897 Q. How many tugs did you have for that?

A. I think we had four.

898 Q. How powerful were they?

A. They must have been each of the same size, about 560 h. p., because that was the biggest tug we had at that time.

899 Q. A moment ago you said 650 h. p. Which do you mean?

A. I meant 560; if I said 650 it was a mistake. We towed that large dock up to Hamburg City also.

900 Q. In regard to the steamers which have been towed, what can you tell us about that?

A. If we towed a steamer and the machinery was in order and perhaps the steering gear was fouled, in our opinion that was not a sufficiently difficult job, so I have not man- [fol. 280] aged those things, because we call that pretty regular work.

901 Q. But your Company has done such work?

A. Yes.

902 Q. On the rivers of Germany?

A. Yes.

903 Q. Tell us some cases that you have had personal knowledge of.

A. As far as I remember, I have had one, the "Brasilia", a boat belonging to the Hamburg-America Line, which was towed with cargo and a broken rudder from Terschelling—that is one of the Dutch islands in the North Sea—to Hamburg.

904 Q. How large a ship was she?

A. 6,715 tons gross.

905 Q. How many tugs were there?

A. Three tugs.

906 Q. Of what power?

A. There was the tug "Hermes", "Hercules" and "Albatros".

907 Q. Of what power were those tugs?

A. The "Hermes" was a tug of 880 h. p., the "Hercules" was a tug of 760 h. p. and the "Albatros" was a tug of 560 h. p.

908 Q. In the case of the "Brasilia", was her machinery in order?

A. Yes, her machinery was in order, but she could not steer because her rudder shaft was broken after bad weather.

909 Q. Have you any other ships you can tell us about?

A. We issued a brochure for publicity purposes, and a

lot of photographs were taken of such tasks which, in our opinion, were sufficiently difficult as regards towing and salvage.

910 Q. Can you tell us about the steamer "Weirbank"?

A. I know of steamers which have been towed, belonging to the same Company; but that has been since I left the firm. I remember the "Brasilia".

[fol. 281] 911 Q. That was in your own experience?

A. Yes.

912 Q. Tell me of the others that your Company has towed since you left, which you know about.

A. I know the "Rugia", also belonging to the Hamburg-America Line. That is a boat of 6,672 tons gross.

913 Q. Where was she towed?

A. The machinery was out of order, and she was towed from Flushing up the river to Antwerp, and the River Scheldt is very narrow and has many bends.

914 Q. She could use her rudder, could she?

A. Yes, she only had her machinery broken. But in that case she was only towed with one tug of 3,000 h. p., the "Wotan". Then there was another steamer, the "Weirbank", of 5,150 tons gross. That steamer was totally disabled and she was towed from Kiel, through the Canal, up to Rotterdam.

915 Q. Is that up the River Maas?

A. Yes. She was towed by two tugs, the "Seeteufel" and the "Hercules". The "Seeteufel" is about 1,300 h. p., and the "Hercules", which we have already had, is 760 h. p.

916 Q. Was that towage on the River Elbe and the River Maas?

A. It was towed from Kiel through the Canal and then down the Elbe from Brunsbüttel, and down the North Sea and up the Maas to Rotterdam.

917 Q. Are there any others?

A. There is one, the "Tigre"; but that does not quite fit this, because she was towed with her rudder broken from the Atlantic to Oslo with two tugs.

918 Q. Have you any other cases of a river towage?

A. There is one, but that is only a case of assisting. That is the case of the steamer "Herbjörn", a vessel of 8,038 tons gross.

[fol. 282] 919 Q. What was wrong with her?

A. Her rudder was damaged, and she was assisted in the River Elbe from Brunsbütted up to Harburg Harbor, a distance of about ten miles to the south from here.

920 Q. By what tug?

A. The "Seeteufel".

921 Q. Do you know what the damage to her rudder was?

A. No.

922 Q. Do you know if the rudder could be used?

A. I do not think so, because if it could have been used I do not see why they should take a tug. It seems to me, because the rudder could not be used that they took a tug.

923 Q. Have you any other case with regard to that same ship?

A. Yes, the same ship, the "Herbjörn", was towed again with her rudder damaged from Hamburg down to the Elbe Light Vessel No. 3.

924 Q. Is that at the mouth of the Elbe?

A. No, a little way in.

925 Q. By what tug was it towed?

A. The "Jason".

926 Q. Of what horsepower?

A. I am not sure, because that is one of the new boats and I do not know her horsepower; she might be 900 h. p.

927 Q. Does this book give it? (Book handed to witness.)

A. Yes; it is 500 h. p.

928 Q. Were these different towages successful so that the ships got to their destinations safely?

A. Yes.

Cross-examination.

By Mr. Jones:

929 Q. Do you know whether these towages were conducted by day or by night?

A. No, I do not know that.

930 Q. How far is Stettin from the Baltic?

[fol. 283] A. From Stettin down to Swinemunde it is about 40 miles.

931 Q. What is the width of the river?

A. Up to Stettin it is, for about a distance of 8 miles, very narrow.

932 Q. How narrow is it?

A. The river might be 80 or 90 meters up to 100 meters.

933 Q. And below that wh[illegible] it?

A. Below that we pass a very shallow sea, and through that sea there is a Channel of the width of about 90 meters, and you have to go right down that to Swinemunde.

934 Q. Is the Channel straight?

A. There are some bends in it, but not difficult bends.

935 Q. Is the river straight?

A. Yes—the river is not quite straight; but there are not very difficult bends.

936 Q. No bends?

A. It might differ one or two points.

937 Q. But no more?

A. No.

938 Q. Then the Kiel Canal is straight, is it not?

A. Yes; there are only some very slight bends there.

939 Q. There are no sharp bends in the Kiel Canal?

A. No, there are not any sharp bends.

940 Q. And the Elbe River is straight?

A. No, you cannot call that straight; there are bends in it and they are up to 3 or 4 points.

941 Q. There are no such bends in the Elbe River as there are in the Weser River, are there?

A. Yes, they are about the same.

942 Q. Where?

A. When you come down past Pagensand and down the river, you have to alter your course at least 3 points.

943 Q. What is the width of the river there?

A. I think it is about 400 or 500 meters—that is not the river, but the Channel.

[fol. 284] 944 Q. Can you tell me of a single bend in the Elbe River where there is as much as 50 degrees of bend, where the Channel is only about 100 meters wide?

A. No; the Elbe is wider.

945 Q. So the Elbe is a much wider river than the Weser?

A. Yes.

946 Q. And a much more easily navigated river than the Weser?

A. There is more traffic on the Elbe than there is on the Weser.

947 Q. If you eliminate the question of traffic you will concede that the Elbe River is a much more easily navigated river than the Weser.

A. I would not say easier; but there is more space, or more room.

948 Q. There is more room with less sharp bends and a Channel which is much broader?

A. Yes.

949 Q. And you have not as many bends?

A. Not such big bends as on the Weser.

950 Q. And it is well known that the Weser has sharp bends and a narrow Channel?

A. Yes, in some places—in one place it is about 45 degrees—about 4 points.

951 Q. Then you would concede that it is more difficult to tow in the Weser than it is in the Elbe?

A. To a certain extent, certainly.

952 Q. You have not cited a single case of any vessel which has been towed in the River Weser.

A. No, and I can explain why. It is because on the River Weser there is the Nord Deutsche Lloyd. They used to do their own towage if any of their ships were in distress. Besides, there is another towage company, the Unterweser. As the River Weser has not half the traffic of the River Elbe, these two firms, the Nord Deutsche Lloyd and the Unterweser, can handle the necessary towing on the River Weser themselves. That is why I do not think we have had [fol. 285] very much towage on the River Weser in the case of ships in distress.

953 Q. You cannot give me a single case of a ship in distress being towed on the River Weser?

A. I can give you a ship which was sunk in the River Weser and which was salved by us and then towed to Bremerhaven.

954 Q. But not up above Bremerhaven?

A. It was below Brake.

955 Q. That is out to sea, is it not?

A. Yes.

956 Q. You do not suggest that the River Maas at Rotterdam is a narrow river, do you?

A. The River Maas up to Rotterdam is narrow, too; the Channel of that is not so broad.

957 Q. But it is much broader than the River Weser, is it not?

A. There are no bends in it.

958 Q. And the Scheldt leading to Antwerp—I have seen that river also, and nobody can say that that river is as narrow as the Weser.

A. There are many sharp bends there.

959 Q. But it has got a wide Channel, has it not?

A. Well, many ships get ashore in it and catch the ground in the Scheldt going up to Antwerp and coming down.

960 Q. It is a wide Channel up to Antwerp, is it not?

A. It is not deep and it is not wide enough.

961 Q. How wide do you say it is?

A. I only know that there is not a river connected with the North Sea with so many steamers running aground as is the case in the River Scheldt. Many steamers run aground in the Scheldt because the river has a very, very strong current and there are very sharp bends in it and at some spots it is very shallow. It is one of the worst rivers of them all.

[fol. 286] 962 Q. Exactly the same conditions prevail in the River Weser—a great many ships run aground there, do they not?

A. No, very few.

963 Q. The Channel of the River Weser is narrower than the Channel in the Scheldt, is it not?

A. On the Upper Weser it is.

964 Q. And the current there is very strong, too, is it not?

A. No, not so very strong on the Weser.

965 Q. It is just as strong as it is in the Scheldt, is it not?

A. There is much more current in the Scheldt than there is in the River Weser—there is more current here on the Elbe than there is on the River Weser.

966 Q. The River Weser is the narrowest of all these rivers and it has the sharpest bends of them all, has it not?

A. It is the smallest.

967 Q. And it has the sharpest bends?

A. No, the bends are not so sharp as the Scheldt. If you lay a chart on the table, you will see it exactly.

968 Q. We can get the information from the chart, as well as from you.

A. Yes, but the chart is my knowledge of it, because I have not measured it. I think a good chart of the River Weser, the River Elbe and the Scheldt will show you how things are in reality.

969 Q. Then the chart is more valuable?

A. Yes; that is my experience.

970 Q. Your experience is that the chart is more valuable than the testimony of witnesses as to these points?

A. Yes.

Redirect examination.

By Mr. Griffin:

971 Q. Would there be any objection to taking this steamer down from Bremen at night?

A. No, because there are good leading lights.

[fol. 287] 972 Q. And I ask you to assume that there was moonlight on this particular night?

A. Yes.

973 Q. Is towing at night for this ship better or worse than towing by day?

A. Towing by day has the benefit that you can see it better; but towing at night you have the benefit that you have much less traffic in the river.

974 Q. Would you see any danger in towing at night?

A. No. If you come with a ship in distress and you enter the river at daybreak, you will tow her up and you will be in the City by next morning, and it is just the same when you leave. On the other hand, you must leave with such a ship at a certain period of tide.

975 Q. At what period of tide?

A. About an hour or two after the flood begins. You must leave so that you can pass the shallow spots which are always nearer the harbor than farther down the river, because there it is broader and deeper. You must pass those shallow spots on a flood tide, because if you touch the ground, then you have the chance of soon getting off again, because the water is raising and getting deeper. But if you run aground on an ebb tide, you will have to stay there until the next flood tide.

Recross-examination.

By Mr. Jones:

976 Q. You have never had any experience of towing on the River Weser, have you?

A. No; but it is the general experience; it is the same on the River Elbe, the River Weser, and the Scheldt, leaving with the flood tide and passing the shallow places with the flood.

(The witness withdrew.)

[fol. 288] Captain GEORGES SIEVERS, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

977 Q. What is your full name?

A. Georges Sievers.

978 Q. Have you had experience at sea?

A. Yes.

979 Q. How many years?

A. 30 years.

980 Q. How many years as Master?

A. Eight years.

981 Q. On what kind of vessels?

A. Steamers from 3,000 to 6,000 tons.

982 Q. Have you traded in those steamers from Hamburg?

A. Yes, between Hamburg and America.

983 Q. When did you come ashore?

A. 1920.

984 Q. For the last nine years, what has been your occupation?

A. I am Surveyor to the Hamburg Underwriters.

985 Q. Have you anything to do with salvage cases?

A. Yes, I have very often to do with salvage cases and also to bring disabled ships from port to port.

986 Q. Does that mean towing them?

A. Yes.

987 Q. What arrangements do you have to make for towage?

A. I have to give the number and power of the tugs, the length of the tow ropes and the crew, and lights and anchors. I am responsible for bringing the ship without any damage to the port.

988 Q. What experience have you had in towage when you have been on board and directing operations? You told me of several, and perhaps it will save time if I suggest them. There was the case of the "Hathtor".

A. Yes.

[fol. 289] 989 Q. How large a ship was she?

A. I was Captain of that ship and she was about 6,000 tons gross.

990 Q. Where was she towed? A. From Antofagasta in Chile, to England.

991 Q. Through the Panama Canal?

A. Yes.

992 Q. Was she disabled?

A. The engines were disabled, but there was steam on board and the anchors and the steering gear and everything was in order.

993 Mr. Jones: From where to where?

A. From Antofagasta to Portsmouth.

994 Mr. Griffin: What was the "Venerable"?

A. That was an old English battleship.

995 Q. How large was she?

A. 14,000 tons.

996 Q. Where did you tow her to?

A. I towed her from Dover to Bremerhaven.

997 Q. What was her condition?

A. The engines were out of the ship and the ship was full of scrap iron.

998 Q. What about her rudder?

A. She had a rudder, but we could not steer the ship.

999 Q. Was the rudder out of order?

A. The rudder was there; but we had no power on board.

1000 Q. How many tugs were used?

A. Two tugs.

1001 Q. Of what power?

A. 1,000 to 1,200 h. p.

1002 Q. Is that for the two, or each?

A. Each.

1003 Q. I think you also told me about the steamer "Kurslack".

A. Yes.

1004 Q. How big was she?

A. 1,400 tons.

1005 Q. Where was she towed?

A. From the Orkney Islands to Leith, and from Leith to Grangemouth.

[fol. 200] 1006 Q. Is that on the River Forth?

A. Yes, above the Firth of Forth Bridge.

1007 Q. What was her condition?

A. She had no rudder and no propeller.

1008 Q. How many tugs did you use?

A. One tug from the Orkneys to Leith, and that was about 1,000 to 1,200 h. p.

1009 Q. And from Leith to Grangemouth what did you use?

A. We had one small tug to bring the ship into the docks at Leith, and from Leith to Grangemouth we had two tugs to take her out of the docks into the river, and one tug to take her to the docks at Grangemouth, and from there we used two tugs.

1010 Q. Then there was the "Ingekyntsmann".

A. Yes, that was about 1,000 tons; that was sunk near Kiel.

1011 Q. Did she have water in her or was she dry?

A. She was half full of water.

1012 Q. Where did you tow her?

A. From Kiel to Hamburg.

1013 Q. What was her condition as regards engines and rudder?

A. The engines and rudder were there, but we could not use them.

1014 Q. They were disabled?

A. Yes.

1015 Q. What was the condition in the river when you towed her there?

A. It was full of ice.

1016 Q. How many tugs did you use?

A. Two, one of 550 h. p. and one alongside of 300 h. p.

1017 Q. Did you tow those ships successfully without accident?

A. Yes.

1018 Q. I think that you towed up some grain elevators?

A. Yes, in December, 1923, I towed them from Hamburg to Liverpool.

1019 Q. How many tugs did you use?

A. One tug of about 1,000 h. p. and on the River Elbe we had the tug alongside.

[fol. 291] 1020 Q. In this case the steamer "Isis", a vessel of about 4,500 tons with three-quarters of her cargo on board, had her rudder damaged so that it could not be used, and it was lashed amidships. She had three tugs, one of 1,080 h. p. and two of 800 h. p.; the first tug was ahead on a line and the other two tugs were alongside aft. The engines of the "Isis" were in good condition and she had twin screws. Will you state whether, in your opinion, the vessel, so equipped, was seaworthy and safe to be towed from Bremen to Hamburg?

1021 Mr. Jones: I object. The witness never saw the vessel and is not in a position to express any opinion as to the seaworthiness of the vessel or the safety of the undertaking.

1022 Mr. Griffin: What is your opinion?

A. In my opinion the ship was seaworthy.

1023 Q. Did she have enough tugs?

A. Yes.

1024 Q. And strong enough tugs?

A. Yes, and also strong enough tugs.

1025 Q. She started at night. Is there any objection to that?

A. There is not so much traffic at night time as there is in the day time.

1026 Q. Do you think it is better to tow at night time, or not so good, or just the same?

A. Just the same.

1027 Q. At what time of the tide should such a vessel start?

A. It is better if the tide is from ahead.

Cross-examination.

By Mr. Jones:

1028 Q. This towage from Antofagasta to Portsmouth was all in the open ocean, except when you came through [fol. 292] the Panama Canal, was it not?

A. Yes.

1029 Q. The towage from Dover to Bremerhaven was all in the open ocean, was it not?

A. No; we had to come into the River Weser.

1030 Q. But the River Weser down at Bremerhaven is a broad river, is it not?

A. Yes.

1031 Q. It is not so narrow there as it is between Bremerhaven and Bremen?

A. No.

1032 Q. So it is a different thing towing to Bremerhaven from Dover, than towing from Bremen to Bremerhaven?

A. Yes, and it is a different thing towing a 14,000 tons battleship than it is towing this ship, the "Isis".

1033 Q. Do you mean to suggest that towing is dangerous at best?

A. No, it is the same day or night.

1034 Q. I did not ask you anything about day time or night time. I asked you whether or not towage was a dangerous occupation at best.

A. Not always.

1035 Q. But sometimes it is?

A. Yes, sometimes it is.

1036 Q. You, as a shipmaster, would much prefer to proceed under your own power and with a rudder than to proceed in tow; is that not the fact?

A. Yes. If the engine and rudder and everything is all right, it is not necessary to have a tug.

1037 Q. Then it is better to proceed under your own power than to proceed in tow?

A. Yes, it is better.

1038 Q. And it is safer?

A. If I have a disabled ship and I take tugs enough, it is also safe.

1039 Q. Do you mean to tell me that it is as safe to pro- [fol. 293] ceed in tow as it is to proceed under your own power?

A. It is always safer to proceed under your own power.

1040 Q. And that is generally recognized by all seafaring men the world over?

A. Yes.

1041 Q. With regard to this towage of the "Kurslack"; she was a small vessel of 1,400 tons?

A. Yes.

1042 Q. And she was towed from the Orkney Islands to Leith?

A. Yes.

1043 Q. And that is all in the open ocean?

A. Yes.

1044 Q. And from Leith to Grangemouth is up the Firth of Forth, is it not?

A. Yes.

1045 Q. There is a good broad stretch of water up there, is there not?

A. Yes, but you have to pass the Firth of Forth Bridge, and I do not know what the distance is between the arches of that bridge.

1046 Q. I have seen that bridge only recently; and the spans of that bridge are very wide, are they not?

A. Yes.

1047 Q. It is one of the biggest bridges in the world, is it not? A. Yes.

1048 Q. For a long time it was put in all the history books as the biggest and highest bridge in the world, was it not?

A. Yes.

1049 Q. The "Ingekuntsmann", which went from Kiel to Hamburg was a little craft of 1,000 tons, was it not?

A. Yes.

1050 Q. How big were the grain elevators?

A. I think they were 24 meters by 12 meters.

1051 Q. They were pretty small affairs, were they not?

A. Yes, but they had no rudder or anything.

1052 Q. What depth would they be?

A. About 4 ft. or 5 ft.

1053 Q. Are they all the craft that you can find, after [fol. 294] looking through your records, to give to Mr. Griffin to illustrate towage in your experience?

A. Yes.

(The witness withdrew.)

Hermann Asmus, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

1054 Q. What is your name?

A. Hermann Asmus.

1055 Q. What is your business?

A. At the present moment I am expert for an Insurance Company.

1056 Q. Doing what sort of work?

A. Doing average business, when a ship is in distress.

1057 Q. Do you mean, average adjusting?

A. No, taking care of the interests of the Insurance Company when the ship is ashore or damaged.

1058 Q. How long have you been in that business?

A. From 1926.

1059 Q. And before that?

A. Before that I was in the salvage and towage business.

1060 Q. For how long?

A. From 1904 to 1926.

1061 Q. For twenty-two years?

A. Yes.

1062 Q. With what Company?

A. With the Northern Salvage Union of Hamburg, or, in German, Nordischer Bergungsverein.

1063 Q. What was the business of that Company?

A. She was doing salvage, principally, and towing—she was towing principally here in German waters and doing salvage work out in foreign waters.

[fol. 295] 1064 Q. Where were you stationed during those twenty-two years?

A. From 1904 until 1914 I was stationed in the Mediterranean and the Baltic Sea.

1065 Q. And after that where were you stationed?

A. After that, from 1915 to 1926, I was stationed as Cuxhaven and I was Superintendent of the Cuxhaven Company.

1066 Q. What did you have to do as Superintendent?

A. If there was a salvage case on, I had to direct the business. There were several steamers on the job and I had the management.

1067 Q. What experience have you had with regard to towage?

A. I had experience when I towed in steamers which I floated myself in the Mediterranean, and after that I directed the steamers doing towing business, whenever we got the business.

1068 Q. You spoke of having towed some vessels yourself in the Mediterranean; tell us about that.

A. I have had to tow steamers in when they had disabled engines or rudders or sternposts, or something like that.

1069 Q. Can you give us some instances or cases of particular steamers?

A. In 1912 I had a German steamer stranded on the Island of Tenedos and she had broken her sternpost and rudder. I floated that steamer and towed the steamer from the Island of Tenedos, through the Dardanelles, through the Sea of Marmora, to Constantinople.

1070 Q. How large a steamer was she?

A. She was a boat of 7,000 tons.

1071 Q. Had she a full cargo?

A. Yes, she had a full cargo; but we discharged some at the stranding place—I could not say exactly, but I should say about half her cargo was discharged.

[fol. 296] 1072 Q. How many tugs did you use for the towage?

A. Two.

1073 Q. How large were they?

A. One was 1,000 h. p. and the other 500 h. p.

1074 Q. You also told me about the steamer "Vesta".

A. That was stranded in the North Sea on the Island of Juste. She was loaded with iron ore and had a broken rudder and sternpost; and we floated the steamer after jettisoning part of the cargo and we towed her into Emden in a North Sea gale.

1075 Q. What river do you go into to get into Emden?

A. The Ems.

1076 Q. Is that a wide river or a narrow river?

A. That is a narrow river half way up and it has many bends.

1077 Q. How many tugs did you use for that?

A. Towing her in, first to Borkum, we had two; but up the river we had three because there was one alongside for pumping purposes at the same time.

1078 Q. What was the horsepower of those three tugs together?

A. About 1,000 horsepower the three of them.

1079 Q. After that did you tow the same vessel at Emden?

A. After the vessel was discharged at Emden, then it was agreed for two tugs about 800 horsepower to tow the vessel to Stettin; that is down the River Ems, through the North Sea, up the Elbe as far as Brunsbüttel, through the Kiel Canal, along the Baltic, and up the River Oder as far as Stettin, where she was repaired.

1080 Q. You say that you had two tugs for that?

A. Yes.

1081 Q. About what power?

A. About 800 horsepower together.

[fol. 297] 1082 Q. Were all those towages successful and without accident?

A. Yes.

1083 Q. Do you know the steamer "Isis"?

A. Yes, I know that steamer.

1084 Q. In this case her rudder was damaged and was lashed amidships, and her engines were in good order and she had twin screws. She was towed by three tugs, the "Hoheweg" 1,080 horsepower on a line ahead, and two other tugs of 800 horsepower each alongside aft, and she was leaving Bremen bound for Hamburg, and leaving at night about the beginning of the flood tide, and she had about three-quarters of her cargo on board. Will you state whether or not in your opinion the ship in the condition I have described was safe and seaworthy for that trip?

1085 Mr. Jones: I object to that question on the grounds I have already stated with regard to other witnesses.

A. Yes.

1086 Mr. Griffin: Did she have enough tugs?

A. Sure.

1087 Q. And enough power?

A. Yes—too much power.

1088 Q. Is there any objection to going at night?

A. No, I do not see any objection.

1089 Q. How is the traffic at night compared with the day?

A. At night it is less, especially as there are no small craft knocking about at night.

1090 Q. At what stage of the tide should such towage begin from Bremen?

A. Just at the beginning of the flood tide.

[fol. 298] 1091 Q. After the "Isis" came back, after this second stranding, did you see her?

A. Yes.

1092 Q. Where?

A. I saw her in dock.

1093 Q. Where?

A. In Bremen.

1094 Q. Did you examine her rudder?

A. Yes.

1095 Q. Tell us in what condition you found the rudder, first as regards the lashings and that sort of thing.

A. I found the rudder lashed amidships—the lashings were from the blade of the rudder up the side of the stern—up to the quarter of the ship.

1096 Q. How were those lashings, tight or loose?

A. They were tight.

1097 Q. What else did you find?

A. The blade was screwed down.

1098 Q. Was that tight?

A. Yes.

1099 Q. Was it possible to move the rudder in th position?

A. No.

1100 Q. How was the rudder standing?

A. The rudder was amidships, and at the lower part the blade went a little bit to starboard.

1101 Q. How many degrees?

A. About five degrees.

1102 Q. How far in from the after end of the blade forward did the bend extend?

A. First of all it was straight and then it began about in the middle.

Cross-examination.

By Mr. Jones:

1103 Q. You have never towed on the River Weser yourself?

A. No.

1104 Q. You have had no experience on the River Weser at all?

A. No.

1105 Q. So you do not feel competent to testify as to towing on the River Weser?

[fol. 299] A. I have refloated steamers on the River Weser as the Superintendent.

1106 Q. Where?

A. Between Brake and—I could not tell you exactly which buoy it was.

1107 Mr. Griffin: Above or below Brake?

—. Above Brake.

1108 Mr. Jones: Is Brake up the river from Bremerhaven?

A. It is up the river from Bremerhaven.

1109 Q. How far from Bremerhaven?

A. I cannot say to a mile, but I should say about seven or eight miles.

1110 Q. You never had any experience in the river between Brake and Bremen?

A. I know the river; I have been up there many times.

1111 Q. But you never towed there?

A. No.

1112 Q. Did you know that the rudder post of the "Isis" was _dly twisted?

A. The rudder post itself was twisted.

1113 Q. Will you describe that twist to us so that we can understand what the twist was?

A. If I take this match, for instance, and twist the match around like this, that shows what it was. But you could not see anything from the twist. The only way we noticed the twist was that the blade was amidships and the rudder quadrant was standing to the side. That is how we noticed the twist, but on the shaft itself you could not see the paint off.

1114 Q. Was the twist of the stock in that portion which is up in the vessel's counter or that below the vessel's counter?

A. That is hard to say. I think nobody could answer that question because you could not see anything in the shaft.

1115 Q. Was the shaft a solid piece of steel?

A. Yes.

[fol. 300] 1116 Q. And that solid piece of steel was fastened to the rudder blade and extended up through the counter of the ship, and the top of it was connected with the quadrant; is that correct?

A. I am not sure, but I think that the shaft was in two pieces—I am not sure if it is one piece or two pieces.

1117 Q. And you do not know where the twist in the shaft was—you do not know whether it was in the upper portion or in the lower portion?

A. That I do not know.

1118 Q. You could not see with the eye?

A. No.

1119 Q. You made no measurements or tests, but you merely looked at it casually with your eye?

A. You could only notice it on the quadrant and the blade of the rudder.

(The witness withdrew.)

Emile Auguste Schubert, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

1120 Q. What is your full name, Mr. Schubert?

A. Emile Auguste Schubert.

1121 Q. What is your business?

A. Shipbuilding engineer.

1122 Q. And ship's surveyor?

A. Yes.

1123 Q. Are you employed by the Hamburg-America Line?

A. Yes.

1124 Q. How long have you been doing that work?

A. In the Hamburg-America Line, sixteen years now.

1125 Q. And before that?

A. I was outside manager at a shipyard.

[fol. 301] 1126 Q. For how long?

A. Twenty-three years.

1127 Q. And before that were you at sea?

A. Before that I was at sea about a year and a half, and I was in the Navy for two years.

1128 Q. Do you know the steamer "Isis"?

A. Yes.

1129 Q. You know that she went ashore and stranded on two occasions?

A. Yes.

1130 Q. After the first time did you see her in dry dock?

A. I only saw her the first time.

1131 Q. Not the second?

A. No.

1132 Q. The first time you saw her was she in dry dock?
A. She came in dry dock. I was there before she went into dry dock, and I waited until she was in the dock.
1133 Q. In what condition was her rudder?
A. The rudder was twisted over to the starboard and her rudder shaft was twisted.
1134 Q. Was the blade twisted?
A. No, as far as I could see the blade was straight.
1135 Q. What was done to the rubber; was it lashed?
A. Yes, it was lashed amidships by the quadrant being screwed.
1136 Q. What was done with those screws—were they screwed down hard and tight?
A. They were screwed down tight and the quadrant was lashed to both sides.
1137 Q. How were the lashings made tight?
A. I do not remember very well now because it was 2½ years ago.
1138 Q. Were the lashings tight?
A. Yes.
1139 Q. How was the blade standing—was it standing amidships or on one side?
A. When she left the dock the rudder blade was amidships.
1140 Q. You did not see her the next time?
A. No.

[fol. 302] Cross-examination.

By Mr. Jones:

1141 Q. Was the dock pumped dry when you saw her in dock?
A. No, not dry, only enough for us to see the rudder.
1142 Q. Was the lower part of the rudder covered with water or was it up above the water?
A. No, the bottom of the rudder was in the water.
1143 Q. So you could not see the bottom of the rudder?
A. No, not the bottom of it but we could feel it. We tried with boat hooks and saw if it was bent or broken.
1144 Q. All you know about the bottom of the rudder was through feeling it with a boat hook?
A. Yes, we tried to feel if there was anything wrong with the rudder under the water.

1145 Q. But you did not pump the dock out completely, so that you could see the whole of the rudder?

A. No. I do not remember how much water was left, but there was not much.

1146 Q. You are not in a position to say in exactly what condition the bottom of the rudder would be, because you could not see it?

A. We could not exactly see it because we could not see underneath the water; but we could feel if there was anything wrong.

1147 Q. You relied on feeling the rudder to see if there was anything wrong with the bottom of the rudder?

A. I do not understand that.

1148 Q. (Through the Interpreter:) You relied on feeling the rudder to see if there was anything wrong with the bottom of the rudder?

A. It can be felt.

1149 Q. (Through the Interpreter:) Did you rely upon feeling alone to ascertain what was wrong with the bottom of the rudder?

A. We did not see it.

[fol. 303] 1150 Q. (Through the Interpreter:) Did you rely upon feeling alone to ascertain what was wrong with the bottom of the rudder—yes or no?

A. Yes; we could not see underneath the water.

1151 Q. So you did rely upon feeling alone to ascertain what was wrong with the bottom of the rudder?

A. Yes.

1152 Q. Will you tell me where the twist was in the rudder stock?

A. You can never say where it is twisted. It was twisted either in the whole length or in one place. It is only when the blade is going over this way and the post is here that you can see the twist in it. Sometimes when it is twisted a lot or there is some fault in the rudder stock, the stock will open. But if it is not twisted very much, as in the case of the "Isis", you cannot see where it is twisted.

1153 Q. Did the rudder stock consist of one piece of steel or two pieces of steel?

A. The rudder was one piece up to the coupling.

1154 Q. So the rudder stock ran through the overhang astern, beginning at the quadrant where the coupling is, and down through the overhang of the bottom of the blade of the rudder?

A. No, the rudder stock is in two pieces; one piece is on the rudder, and here is the coupling at the top of the rudder blade, and the next piece is above that.

1155 Q. Do you know in which of those two pieces the twist was?

A. The upper one.

1156 Q. The one from the coupling up to the quadrant?

A. Yes.

1157 Q. The twist was in that piece?

A. Yes.

Redirect examination.

By Mr. Griffin:

1158 Q. From your examination of the rudder when you saw it in dry dock, could you tell whether the blade was bent [fol. 304] or not?

A. No, it was straight.

1159 Q. Do you feel certain of that?

A. Yes, absolutely certain of that.

(The witness withdrew.)

WILHELM JENFELDT, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

1160 Q. Is your name Wilhelm Jenfeldt?

A. Yes.

1161 Q. (Through the Interpreter:) Are you employed by the Hamburg-America Line?

A. Yes.

1162 Q. For how long have you been?

A. Thirty-nine years.

1163 Q. What is your position?

A. Assistant Inspector to Mr. Schubert, who is the Inspector.

1164 Q. After the steamer "Isis" returned when she had stranded the second time, did you see her?

A. Yes.

1165 Q. Where was she when you saw her?

A. She was lying at the pier in Bremen.

1166 Q. Was she in dry dock?

A. No. I saw her at the pier discharging her cargo.

1167 Q. (Through the Interpreter:) Was the rudder lashed when you saw her?

A. Yes, the rudder was fastened with wood and bolts.

1168 Q. And was it lashed with lashings?

A. Yes.

1169 Q. Were they tight?

A. Yes, they were very tight.

1170 Q. How did the rudder stand—was it amidships or to either side?

A. It was straight amidships.

[fol. 305] Cross-examination.

By Mr. Jones:

1171 Q. Did you examine the ship in dry dock later?

A. Yes.

1172 Q. In what condition did you find the rudder at that time?

A. The rudder post was twisted.

1173 Q. (Through the Interpreter:) What portion of the rudder post was twisted?

A. The upper part was twisted.

1174 Q. Is that from the coupling up to the quadrant?

A. From the coupling to the rudder engine.

1175 Q. That was the twisted part of the rudder post?

A. Yes.

1176 Q. What did you find wrong with the rudder post?

A. I did not see anything wrong.

1177 Q. (Through the Interpreter:) Did you not find the blade at the bottom of the rudder bent?

A. I did not see it, but if it was bent, it was very, very little.

1178 Q. Did you make no examination of the rudder itself?

A. At first I examined the bottom and later on I examined the rudder.

1179 Q. When you examined the rudder later on, tell us in what condition you found the rudder?

A. I found it to be in good condition.

1180 Q. Did you make no repairs?

A. The upper part was twisted.

1181 Q. Do you mean to say that the bottom of the rudder blade was not bent?

A. No, I could not say whether it was bent or not; if it was bent, it must have been very little.

1182 Q. In other words, you do not know?

A. No.

(The witness withdrew.)

[fol. 306] HERMANN ASMUS recalled.

Further redirect examination.

By Mr. Griffin:

1183 Q. You told us that when you saw the "Isis" in dry dock after her second accident you noticed a twist in the blade of the rudder, and I did not ask you how far up and down that twist extended?

A. That twist extended about half way up, but it went on very slowly at first, until it came five degrees down below.

1184 Q. How much was it half way up?

A. It started half way up and two-thirds of the way down it was 2 or 3 degrees.

Further recross examination.

By Mr. Jones:

1185 Q. Was that a twist which you could ascertain by feeling with a rod?

A. No, you could see it if you were standing aft.

1186 Q. You could see it with your eye, but it was not such a twist as could have been ascertained by a rod or a stick being run up or down the rudder?

A. I did not have a stick to ascertain it.

1187 Q. You do not think that a stick or a rod would have disclosed the twist?

A. What do you mean by "disclosed"?

1188 Q. I mean this: Assuming that the rudder was under the water and that the only means you had to find out the

twist was by taking a rod and running it up and down the rudder, do you think that such a rod would have disclosed the twist which you saw with your eye?

A. No.

(The witness withdrew.)

(Adjourned for a short time.)

[fol. 307] AUGUSTE WARNS, called as a witness on behalf of the respondent, testifies as follows:

Direct examination.

By Mr. Griffin:

1189 Q. What is your name?

A. Auguste Warns.

1190 Q. Are you Manager of the Average Department of the Hamburg-America Line?

A. Yes.

1191 Q. How long have you been in that position?

A. I have been here for twenty-five years in all and in this position I have been here about fifteen years.

1192 Q. Do you remember the case of the steamer "Isis" in February, 1928?

A. Yes.

1193 Q. After the first stranding that she had, will you state what conversations you had and the letters you wrote?

1194 Mr. Jones: My objections to this testimony are the same as I stated at the beginning.

1195 Mr. Griffin: What is the answer?

A. When I heard of the accident I telephoned to Mr. Dahlstrom, who is on the Board of the Hamburg-America Underwriters, and I told him what had occurred.

1196 Q. On what date was that?

A. That was on the 8th February, 1928.

1197 Q. In substance what did you tell him?

A. I told him how the accident had occurred, and that Captain Reichenbächer and Mr. Shubert were in Bremen, and that they had decided that the motor ship "Isis" should go into a dry dock and should be lifted sufficiently for them to examine the rudder.

[fol. 308] 1198 Q. Did you call him again the next day?

A. That was on the 8th, in the evening, and on the 9th February, the next day, I told him that they had decided to put the vessel in tow of tugs from Bremen to Hamburg.

1199 Q. Did you tell him how many tugs?

A. I told him that they had decided on two tugs, and later on that they would have three tugs, and that the rudder was to be fastened.

1200 Q. Where was the ship to be towed?

A. From Bremen to Hamburg.

1201 Q. Did you say anything about her cargo?

A. No, the Bremen cargo had been discharged because it was at the port of destination, and the rest of the Hamburg cargo was still on board.

1202 Q. Did you tell him whether her engines were in good order or not?

A. Yes, I told him that the engines were in good order, and that he could use both screws.

1203 Q. Did you ask him to do anything?

A. No. He agreed with what Captain Reichenbächer and Mr. Schubert had decided.

1204 Q. Did he tell you that at once or did he talk with this Committee first?

A. No; he talked with his Committee first and then he said that the Committee agreed.

1205 Q. In your conversations with him did you say anything about a certificate from the Germanischer-Lloyd?

A. No.

1206 Q. Did you then write him a letter, a copy of which is Exhibit 1? (Same handed to witness.)

A. Yes, I wrote him a letter the next day.

1207 Q. Is that a copy of the letter dated the 9th February?

A. Yes.

1208 Q. Is that the same day as you had your second conversation?

A. Yes.

1209 Q. Was there ever any idea so far as you know of [fol. 309] towing this ship to Antwerp?

A. No, I do not know.

1210 Q. Did you ever hear of any talk of towing the ship to Antwerp?

A. No, I did not hear anything about it.

1211 Q. Why did you notify Mr. Dahlstrom about this?

A. Because the motor ship "Isis" and also part of the cargo was insured on the Hamburg Board of Underwriters.

1212 Q. What is the practice in such cases?

A. The practice is for us to notify the Underwriters through this Committee, through Mr. Dahlstrom or someone else, and he puts it before the Committee.

1213 Q. Have you done it many times before?

A. Yes.

1214 Q. And has it been the practice for many years?

A. Yes.

1215 Q. Did you know who the Underwriters were of the cargo?

A. No, we cannot know it because many of the bills of lading were bound for order, and we did not know the owners of the cargo.

1216 Q. Did you know the other Underwriters of the cargo?

A. No.

1217 Q. There was no way in which you could know that?

A. No.

1218 Q. And, therefore, there was no way in which you could notify them?

A. No, we could not do it.

1219 Q. Do you know what the reason was for towing the vessel rather than discharging the cargo?

A. Yes, in order to save the cost of discharging the cargo, storing it and reloading it, and in order to avoid the cargo being damaged by those manipulations.

[fol. 310] 1220 Q. Do you mean by handling in and out?

A. Yes.

1221 Q. Do you know what percentage of the hull insurance there was in Hamburg?

A. She was fully insured in Hamburg.

1222 Q. You do not know whether she was re-insured, I suppose?

A. No.

Cross-examination.

By Mr. Jones:

1223 Q. Captain Reichenbächer was sent over by the Hamburg-America Line to Bremen. Did he report to you or to some other official of the Line?

A. No, he reported to the Nautical Department or to one of our Directors; but I heard what manipulations they had made.

1224 Q. From whom did you get your information?

A. From the Nautical Department.

1225 Q. Do you remember what individual in the Nautical Department?

A. No, because it was too long ago.

1226 Q. Would it be the Operating Department of the Line?

A. Perhaps it was the Freight Department.

1227 Q. But you got no information direct from Captain Reichenbächer?

A. No.

1228 Q. Nor did you get any direct information from Mr. Schubert?

A. No.

1229 Q. It came through some other department?

A. Yes; the next morning I spoke to Mr. Schubert.

1230 Q. That was the morning after the accident?

A. Yes, and also the next morning I spoke to Captain Reichenbächer.

1231 Q. But the information you had at the time which you communicated to Mr. Dahlstrom was the information which you obtained from some official of the Company other [fol. 311] than Captain Reichenbächer?

A. No, I heard it from Captain Reichenbächer and Mr. Schubert—I cannot say exactly, but it may be I heard it from the manager of the Freight Department.

1232 Q. Did they call you on the telephone at Hamburg?

A. Yes, on the 9th, on the morning when Captain Reichenbächer was again in Hamburg.

1233 Q. You saw him, then, after the accident; but before the accident all the information you had obtained was from some other department of this Company?

A. Yes, and also from our agents in Bremen.

1234 Q. Who are your agents in Bremen?

A. Carl Johannes Klingenberg.

1235 Q. Are you positive in your recollection that nothing was said with regard to a certificate of seaworthiness?

A. No.

1236 Q. At no time was anything said?

A. I had nothing to do with it, and Captain Reichenbächer and Mr. Schubert had to make those manipulations.

1237 Q. Did you not tell Mr. Dahlstrom that there would be a certificate of seaworthiness?

A. No, I did not tell him because it was understood in such cases. I told Mr. Dahlstrom nothing about a certificate and also I did not ask Captain Reichenbächer because I only had to do with the fact that the ship was going from Bremen to Hamburg with her two propellers and three tugs.

1238 Q. Are you certain that you said nothing about a certificate of seaworthiness?

A. Yes, I am certain because I had not heard about it.

1239 Q. The ship had cargo at the time for Hamburg and Antwerp?

A. Yes.

[fol. 312] 1240 Q. As I understand it, it was the intention to tow the ship to Hamburg?

A. Yes.

1241 Q. And to repair the ship at Hamburg?

A. Yes.

1242 Q. What was to be done with the Antwerp cargo in the meantime?

A. The Antwerp cargo in the meantime would still be on board and perhaps if the ship had to be repaired in Hamburg she could go with part of the Antwerp cargo into the dry dock.

1243 Q. So it was the intention to repair the ship in Hamburg with the Antwerp cargo on board?

A. Yes; or perhaps if the repairs would be too long, we would have to take the cargo out and to ship it to Antwerp when opportunity occurred.

1244 Mr. Griffin: Do you mean to reship the cargo to Antwerp?

A. Yes.

1245 Mr. Jones: Whether the repairs were made in Hamburg or in Bremen, there was no advantage to the Antwerp cargo?

A. No, there was no advantage, because we could not leave the Antwerp cargo on board during the repairs.

Redirect examination.

By Mr. Griffin:

1246 Q. Mr. Jones just asked you whether there was any advantage to the Antwerp cargo in towing to Hamburg.

If the cargo had been discharged in Bremen, including the Antwerp cargo, and it had been stored while the ship was repaired and had then been re-loaded on the ship, would that cost money?

A. Yes, that would cost money if we had to discharge the cargo in Bremen.

1247 Q. And part of that expense would fall on the Ant- [fol. 313] werp cargo, in the case of general average?

A. Yes.

1248 Q. Do you remember whether there was much or little cargo for Antwerp?

A. No, I do not know, but I should think that most was for Hamburg.

1249 Mr. Jones: You would have the same expense with regard to the Antwerp cargo, whether the ship was repaired in Bremen or in Hamburg?

A. I think there is no great difference in the expense whether we had to repair at Bremen or Hamburg.

1250 Mr. Griffin: If you trans-ship the cargo to Antwerp by some other vessel, then you would not have to reload it in the "Isis".

1251 Mr. Jones: As a matter of fact, is it not true that the reason you brought the "Isis" to Hamburg was to save time for yourselves rather than any benefit to the cargo?

A. I do not understand the question properly.

1252 Q. As a matter of fact, is it not true that the reason you brought the "Isis" to Hamburg was to save time for yourselves rather than any benefit to the cargo?

A. No, I do not understand the question because there is no benefit to the cargo by our going to Hamburg.

1253 Mr. Griffin: There is the benefit of the saving of expense of discharging and reloading.

1254 Mr. Jones: I object.

1255 The Witness: Yes, there was the benefit of the saving of expense.

(The witness withdrew.)

[fol. 314] Captain Otto Reichenbächer recalled.

Further redirect examination.

By Mr. Griffin:

1256 Q. Was there ever any discussion or idea of towing the ship to Antwerp as well as to Hamburg?

A. No.

1257 Q. Will you tell us more fully about your examination of the rudder of the vessel when you saw her in dry dock—just how much water there was, how you did it, and where you stood?

A. As soon as three-quarters of the rudder blade was out of water, we went over from the dock pontoon on board a small rowing boat, and there were four of us together, I think, Mr. Schubert, Mr. Menck, one of the shipyard masters and myself, to see how the rudder pintles and the rudder post were, and we could see that everything was all right, and we were waiting until we could see the last rudder pintle. We felt with our hands whether anything was wrong or not, and the dock was pumping all the time to get the ship higher out of the water. When I left the boat there was two or three feet of the rudder blade in the water. But everything was straight, and there was nothing to see or to feel that it was in any way bent. So I said to Mr. Schubert: "Let me go on deck to turn over the rudder to hard-aport, to see how it stands in the water." Then I went up on deck and we put the helm over and controlled it, and when I came back again, these other gentlemen, Mr. Menck and Mr. Schubert, came back and said: "Everything is all right; there is nothing damaged in the rudder."

1258 Mr. Jones: I move to strike out any testimony as to what anyone else told him, as being hearsay.

[fol. 315] 1259 Mr. Griffin: I understand that you were in this small boat yourself?

A. Yes.

1260 Q. And when the water got as low as it got, there were two or three feet of rudder still under the water?

A. Yes.

1261 Q. What measures did you take to examine those two or three feet? First of all could you see down into the water?

A. We put on a heavy light, because in the meantime it had started to get dark. But we had a strong light and we were searching by our hands to feel if there was anything wrong with the blade. After that we used a small piece of wood, and the rudder was like this (describing) and we were searching down to the bottom to see whether there was anything wrong.

1262 Q. You have indicated with your hands the putting of the strips of wood down to the bottom?

A. Yes.

1263 Q. In the first place, about these pieces of wood, you indicated with your hands that you placed the strips of wood up and down the sides of the rudder in different places?

A. Yes.

1264 Q. Could you tell in that way whether the last two or three feet of the rudder was straight or not?

A. Everything was exact—it was quite straight and there was nothing bent.

1265 Q. And could you be sure of that with your examination?

A. Yes, quite sure.

1266 Q. Then you said you reached down with your arm in the water?

A. Yes.

1267 Q. How far could you reach down with your arm?

A. About 2 ft.

1268 Q. That would reach nearly to the bottom of the rudder?

A. Yes, nearly.

1269 Q. There is evidence that after the ship returned [fol. 316] from her second stranding the lower part of the rudder blade was bent down at the bottom to the extent of about 5 degrees. Was that bending there when you examined it before?

A. No.

1270 Mr. Jones: I object, because he did not see that part of the rudder.

1271 Mr. Griffin: Are you satisfied from your examination that the rudder blade was straight?

A. Yes. I would never undertake a thing like this if I knew the rudder blade was bent. I would not have ordered

her to be sent to Hamburg if the rudder blade was bent. I would have ordered her to be put into dry dock in Bremen.

1272 Q. So you were looking to see if the rudder blade was straight?

A. I was absolutely sure there was nothing wrong with the rudder blade.

Further recross-examination.

By Mr. Jones:

1273 Q. You stated that this vessel had cargo for Antwerp and for Hamburg?

A. Yes.

1274 Q. What was your plan, to tow the vessel to Hamburg, repair her at Hamburg, and then for the vessel to proceed with the cargo to Antwerp, or did you intend to forward the Antwerp cargo by some other means?

A. No, that was not my idea. My idea was to keep the cargo in the ship and to deliver the cargo as quickly as possible because we were afraid to take out the whole of the Hamburg cargo in Bremen and get the cargo more or less damaged, because they had heavy logs on deck and wheat and flour, and other things, from the West Coast. So we thought that it would be best to leave the cargo in [fol. 317] the ship, take it in dock, and see what was wrong with the rudder, and we saw that there was nothing worse than that the rudder stem was twisted, so we thought it would be safest for the ship and the cargo to bring the ship to Hamburg and to make it safe in Hamburg.

1275 Q. So you intended to forward the Antwerp cargo in another ship from Hamburg?

A. Yes.

1276 Q. Why could you not do that as well from Bremen as from Hamburg?

A. We could do it in Bremen also, but we had not the same facilities to repair the ship in Bremen for a long time, as we had in Hamburg.

1277 Q. So it was for your own benefit that you brought the ship to Hamburg rather than for the benefit of the cargo, because you had better facilities for repairing, according to your idea, in Hamburg than you had in Bremen?

A. Yes.

1278 Q. While the ship was being repaired, the cargo would have been entirely separate from the ship—there would have been no connection between the cargo and the ship?

A. I do not understand you.

1279 Q. I understood you to say that you wished to have the repairs done in Hamburg because the facilities in Hamburg were better than the facilities in Bremen?

A. Yes.

1280 Q. I also understood you to say that you intended to send the Antwerp cargo to Antwerp in some other ship than the "Isis". I am right about that, am I not?

A. We often do that.

1281 Q. And you intended to do that in this case?

A. That was not my business.

1282 Q. What did you intend to do with the Antwerp cargo?

A. That was not my business. I did not think about it in [fol. 318] any way because that is the business of the Freight Department as to whether they send the cargo direct on the "Isis" or send it by another boat. But if the repairs to the ship take a long time, then we take out the cargo for Antwerp or Rotterdam or Amsterdam, and send it over by coast steamers.

1283 Q. So there was no benefit to the Antwerp cargo whatever you did, was there?

A. Perhaps if the "Isis" had remained in the same service and went back from Hamburg back to Antwerp, then we could leave the Antwerp cargo in the ship and repair the rudder in Hamburg and the cargo would still be in the ship too.

1284 Q. With respect to this rudder, I understand that when you put the ship in dry dock you pumped the water out of the dry dock until about two or three feet of the rudder was still submerged?

A. Yes.

1285 Q. The water in the dry dock was water from the River Weser, was it not?

A. Yes.

1286 Q. The River Weser water is dirty, such as one sees at Bremen when one goes there, is it not?

A. Yes.

1287 Q. You cannot see through that water?

A. Not very well.

1288 Q. You cannot see at all, because it is dirty water, similar to the dirty water which one sees in any harbor?

A. Well, it is not clean water.

1289 Q. It is not water that you can see through, is it?

A. You cannot see very much.

1290 Q. You do not mean to tell us that you could tell whether or not there was a slight inclination of the lower part of the blade of that rudder simply by feeling with a stick, do you?

A. Yes, we would have felt it.

1291 Q. You think you could?

A. Yes.

[fol. 319] 1292 Q. Could you tell by feeling with your hands whether there was a slight inclination of the blade of the rudder?

A. As far as you could reach down, yes.

1293 Q. But you could not reach down very far?

A. About 2 ft.

1294 Q. And in the winter time it is pretty cold, is it not?

A. It was not so very cold. Anyhow, if it was bent, we would feel it by our hands or by a stick.

1295 Q. Did you see the ship after the second accident?

A. No.

1296 Q. So you do not know about her condition then?

A. No.

1297 Q. You are not in a position to say whether or not that inclination of the blade which was observed later, could have been ascertained by feeling with your hands or with a stick?

1298 Mr. Griffin: I object to that because the witness has just testified that he could have felt it.

1299 The Witness: If the rudder blade was bent after the first accident as you say it was after the second accident, we would have felt it after the first accident.

1300 Mr. Jones: That is your opinion?

A. Yes.

Further redirect examination.

By Mr. Griffin:

1301 Q. Do you remember where the Antwerp cargo was stowed in the ship—whether it was above or below the Hamburg cargo?

A. I have no idea how the cargo was stowed.

1302 Q. That is not in your department?

A. No.

[fol. 320] 1303 Q. So you do not know whether it would have been possible to take the Antwerp cargo out of the ship in Bremen or send it direct to Antwerp?

A. No.

(The witness withdrew.)

1304 Mr. Griffin: Counsel for the respondent, with the permission of counsel for the libellant, states upon the record that neither the Captain nor any of the officers nor engineers of the "Isis" are in Hamburg, nor, so far as he knows, in Germany. They are all at sea and none of them at present is available for examination.

[fol. 321] In United States District Court, Southern District of New York

Before Mark W. Maclay, Esq., Special Commissioner

Louis H. May, Libellant,

against

Hamburg-Amerikanische Packetfahrt, Respondent; the M/S "Isis"

Statement of Evidence Before Special Commissioner

Hearing Held at the Office of the Special Commissioner, No. 44 Wall Street, New York City, December 10, 1930

Appearances

Messrs. Haight, Smith, Griffin & Deming, William Denman, Esq. (Mr. Haight) for the Respondent.

Messrs. McCutchen, Olney, Mannon & Greene; Messrs. Bigham, Englar, Jones & Houston (Mr. Longley) for the Libellant.

FRITZ SCHIER, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Haight:

Q. How long have you been going to sea?

A. Twenty-five years.

[fol. 322] Q. How long have you held a master's certificate?

A. About five years now.

Q. Were you the chief officer of the "Isis" at the time of her two strandings in the Weser River?

A. Yes.

Q. How long had you been in the "Isis" as chief officer, before the accident?

A. About two and a half years.

Q. You joined her when—what was the date that you joined the ship?

A. When I left the ship?

Q. No, when you first went aboard.

A. I think it was September, 1926.

Q. And you were chief officer during the entire time of two and a half years?

A. Yes.

Q. What voyage was the "Isis" on at the time of her first stranding in the river—where did she come from?

A. From the west coast of North America.

Q. Do you remember the ports at which she loaded?

A. She loaded in Los Angeles, San Francisco, Portland, Vancouver——

Q. You also loaded at Seattle, didn't you?

A. Seattle, yes, sir.

Q. And Punta Arenas?

A. Punta Arenas, Central America, yes.

Q. Was the ship at all of the loading ports, fully manned?

A. Yes.

Q. Was she properly equipped?

A. Yes.

Q. You had your full crew aboard?

A. Yes.

Q. All the voyage up to Bremen?

A. Yes.

Q. Was your cargo properly stowed?

A. Properly stowed, yes.

Q. Your ship had full certificates as to equipment and seaworthiness in all respects?

A. Yes, full certificates.

[fol. 323] Q. Her first port of discharge was where?

A. Bremen.

Q. And she also had cargo for what other ports?

A. I think it was Antwerp and Hamburg.

Q. On your voyage from Seattle to Bremen, did everything go well until you got to the Weser?

A. Yes, everything well.

Q. And what happened in the Weser River going up to Bremen?

A. I was on watch when we passed Bremerhaven, from 4 to 8 o'clock, and then I go to sleep, and again I take my watch in the morning from 4 to 8, and then the ship was laying at anchor in the fog.

Q. You went off watch at 8 p. m.?

A. Yes.

Q. Shortly after passing Bremerhaven?

A. Shortly after passing Bremerhaven, yes.

Q. Everything was all right then?

A. Everything was all right then.

Q. When you came back on watch again at 4 a. m., the ship was at anchor?

A. The ship was at anchor, yes.

Q. And in a fog?

A. In a fog, yes.

Q. What happened after that—just briefly—what happened after you came on watch—did anything happen?

A. At 7 o'clock in the morning I see that the ship was on shore with the bow and starboard side, and then my watch ended at 8 o'clock, and at noon, at 1 o'clock, the ship slipped off, I was on the bridge at that time, and the captain too.

Q. You were on the bridge at 1 o'clock?

A. Yes.

Q. And she slid off the bank?

A. She slid off the bank, yes.

Q. And then what happened?

A. She swing around, and with that strong wind, and the current, takes her and swings the stern out to port, to the other side of the river.

[fol. 324] Q. And did the stern touch the bank on the port side?

A. It touched the bank on the port side.

Q. What is the bank of the Weser?

A. It is mud.

Q. All the way up and down the river?

A. All the way up and down the river, yes.

Q. When the stern came up against the bank, was there a hard blow?

A. No, just the ship swings over and we can feel it that we touch the bank, the ship goes over to the port and then comes back.

Q. She listed?

A. Yes, she listed.

Q. First to the port, and then came against the bank?

A. Yes.

Q. You were on the bridge when that happened?

A. I was on the bridge, yes.

Q. After she was floated from the first stranding, she proceeded up to Bremen?

A. Yes.

Q. You had tugs to help you?

A. We had tugs to help us, yes.

Q. Did you find that there was something wrong with your rudder?

A. She always swings starboard.

Q. After she was floated——

A. After she was floated.

Q. (Continuing:) —and you started up the river, you found that she was sheering to starboard?

A. Yes.

Q. And you stopped and got more tugs to help you?

A. Got more tugs, yes.

Q. After you had discharged the Bremen cargo, was your ship drydocked?

A. Yes, we went to the drydock.

Q. What did they then find was wrong with your rudder?

A. They pumped it out—pumped not all the water out—

[fol. 325] and then we found that the rudder stock was bent.

Q. Bent or twisted?

A. Twisted.

Q. While the ship was on drydock this first time, did you go down into the bottom of the dock?

A. No.

Q. Did you go off the ship——

A. No.

Q. (Continuing:) —to look at the rudder?

A. No.

Q. There was some water left in the bottom——

A. Left in the bottom, yes.

Q. (Continuing:) —of the dock?

A. Yes.

Q. So you couldn't get down onto the dock, yourself?

A. No.

Q. Did you see anybody else examining the rudder from a boat?

A. There was one of the pilots from Hamburg, Captain Reichenbacher, and some people of the wharf went down in a boat.

Q. And they examined the rudder?

A. Yes.

Q. While they were examining the rudder, what were you doing?

A I was on the deck and made all clear for lashing the rudder.

Q. What did you yourself do with reference to the lashing of the rudder—were you in charge—were you the man who had charge of that work?

A. Yes.

Q. What did you do?

A. We have special wires, one down on each side, one from the port and one from the starboard side.

Q. And were those wires made fast to the rudder?

A. There is a cut in the rudder blade, and on each end of that wire—I don't know what it is in English—there is a——

Q. Shackle?

A. No, not a shackle, it is a thing that the wire can slip out of, it is a fitting like a cap on the end of the wire, which [fol. 326] makes the end of the wire—which has the same effect as a knot on the end of a rope.

Q. In the rudder blade there is a little section cut out?
A. Yes.
Q. And into that notch, the lashings are made fast on both sides?

The Commissioner: As I understand it, the wire is slipped into the notch, and the fitting on the end keeps it from pulling through?

A. That is right.
Q. How many lashings did you use, Chief?
A. Two lashings.
Q. One on each side?
A. One on each side, yes.
Q. And where were the lashings made fast?
A. Made fast on the bitts on deck.
Q. How did you pull them up tight?
A. With small tackles.
Q. Were they pulled tight?
A. They were pulled tight with small tackles.
Q. After they were pulled tight, were they made fast?
A. Yes.
Q. Under your personal supervision?
A. Yes.
Q. Please state whether or not, as made fact, the rudder was held perfectly solid?
A. Yes.

The Commissioner: What did you do with your steering gear—cast that adrift—the steering gear on the rudder?
The Witness: We pressed it down with screws on the quadrant in the wheelhouse.

Q. While you were lashing the rudder, were the engineers doing any work in the steering engine room?
[fol. 327] A. Yes, they pressed that screw down.
Q. What did they do?
A. They pressed the screw down on the quadrant.
Q. And the result of turning down those screws was what—what did they accomplish by turning down those screws? Why did they turn down the screws?
A. So that the quadrant can't move.
Q. So that when you got through, the rudder was lashed securely amidships by your lashings?
A. Yes.

Q. And then was locked again on the quadrant inside of the steering engine-room?

A. Yes.

Q. After you had finished making your lashings fast, did you yourself go into the steering engineroom and see what the engineers had done?

A. Yes.

Q. You then found the quadrant made absolutely fast?

A. Absolutely fast, yes.

Q. With the quadrant so made fast, can you move the rudder even if you have no lashings, providing the quadrant doesn't break?

A. No, even without lashings you cannot move it.

Q. If the quadrant doesn't give way, or something else break, the rudder can't move whether you have lashings or not?

A. No, can't move.

Q. What you did was to secure it both ways, with lashings and with the brakes, as a double precaution?

A. Yes, double precaution.

Q. Do you know whether or not these screws that were set tight on the quadrant, remained tight, and the rudder was held in position——

A. Yes.

Q. (Continuing:) All the time up to the stranding——

A. Yes.

Q. (Continuing:) at the Lesum—the second stranding?

A. Yes.

[fol. 328] Q. How do you know?

A. I go in on my interest to see that everything was all right.

Q. Were you in the steering engine-room after the "Isis" went ashore the second time down at the Lesum?

A. Yes, when we went up again to Bremen—was down and went up again to Bremen.

Q. But after she was ashore, you were in the room——

A. Yes.

Q. Did you find that the quadrant was still absolutely braked?

A. Obsolutely braked, yes.

The Commissioner: Was that after the second stranding?

The Witness: Yes, after the second stranding.

Q. When you came back to Bremen after the second stranding, was the quadrant still tight under the brakes?

A. Was still tight under the brakes, yes.

Q. You saw that yourself?

A. Yes, I saw that myself.

Q. After it had been decided to lash the rudder and tow the "Isis" from Bremen to Hamburg, who was it that decided what time the ship should leave Bremen?

A. The pilot.

Q. And when did you leave Bremen?

A. We left Bremen about 1:30 a. m.

Q. How was the tide—with you or against you?

A. The tide was against us.

Q. Was that an advantage in steering the ship?

A. Yes, it is better.

Q. Do you remember what kind of a night it was?

A. When we started?

Q. Yes, was there a moon or were there stars or what?

A. Yes, moon shining—clear night.

Q. Was there, in your opinion, any reason why the pilot [fol. 329] should not have gone out at night, with the weather conditions as they were—could you see the river bank?

A. Yes, we could see it on both sides.

Mr. Longley: Objected to, there is no evidence that the witness has any familiarity at all with the Weser River.

Objection sustained.

Q. Had you been up and down the Weser River before?

A. Oh, yes.

Q. How many times?

A. Around six or eight times.

Q. With ships of what size?

A. 8,000 and 10,000 ton boats.

Q. What was the tonnage of the "Isis"?

A. 7,000 tons.

Q. In other words, you have been up with bigger ships than she is?

A. Yes, bigger ships.

Q. How is the Weser River lighted?

A. Good lighted.

Q. Please look at Respondent's Exhibit 9. Does that indicate the lights on the river?

A. Yes.

Q. Were those lights all burning the night you started out?

A. All burning, yes.

Q. In the moonlight, state whether or not you could see the banks of the river as well as the lights in the channel.

A. Yes.

Q. Was there, in your opinion, any reason why it wasn't perfectly safe——

A. No.

Q. (Continuing:) to go down the river when the boat left Bremen?

A. No.

Mr. Longley: Objected to, the witness has not been qualified, or has no knowledge whatever of the Weser River.

Objection overruled.

[fol. 330] Q. When you started out from the dock at Bremen, how many tugs did you have to assist you?

A. Three tugs.

Q. Do you remember the names of any of them?

A. I think the biggest tug we had was the Hoheweg, and the other two was the Lankenauer and the Eversand.

Q. Who was it that supervised making their lines fast on your ship?

A. We watch it?

Q. Who attended to it?

A. I.

Q. You were in charge of it?

A. Yes.

Q. Where were the tugs made fast?

A. Two tugs made fast on each side by No. 4 hatch, and the biggest one ahead.

Q. Did it take you some time to straighten your boat out after you came out from the dock, before you got out into the river?

A. They take us back out of the dock and pulled us right to the middle of the river.

Q. It took some minutes to get the ship straightened around and get her out through that narrow opening into the river?

A. Yes.

Q. Will you please look at Respondent's Exhibit 7, the maneuver book, and tell me about when you think it was,

judging from the maneuvers, that the "Isis" passed out into the river and started down the river?

A. (Referring to Respondent's Exhibit 7.) It must be 2.12 or 2.15 when we started down the river.

Q. Were you on the bridge when you came out between the two piers and started into the river?

A. Yes, I just went up to the bridge.

Q. How long did you remain on the bridge?

A. I think it was 2.30.

Q. Where did you go then when you left the bridge?

A. At 2.30?

[fol. 331] Q. Yes.

A. I went to sleep.

Q. About where in the river was the "Isis" when you left the bridge at 2.30?

A. I think it must be here (indicating on Respondent's Exhibit 8).

Mr. Haight: The witness indicates a point about 8½ kilometers from Hasenburer, which I will indicate with a cross in a circle.

Q. During the time that you were on the bridge, until you left at 2.30, please state whether or not there was any trouble in steering your boat as you went down the river?

A. No, there was no trouble.

Q. Did she show any indication at all of sheering in either direction?

A. No.

Q. How were your two tugs made fast astern—how were their engines running?

A I think they go full speed.

Q. And the tug that was ahead of you—was she also pulling full speed?

A. Also pulling full speed.

Q. What was being done with the engines of the "Isis"?

A. They were ahead for steering.

Q. They were being maneuvered, as the maneuver book shows, for the purpose of steering the ship?

A. Yes.

Q. Was there any trouble in steering the boat as she went down?

A. No, there was no trouble.

The Commissioner: Is she a single screw or double screw?

The Witness: Double screw.

Q. Will you please state, from your experience on the "Isis" and on other ships, whether in your opinion you [fol. 332] consider her perfectly seaworthy to tow, with her rudder lashed amidships, her engines in perfect order and three tugs to assist her, as you had on this occasion?

A. She was.

Q. She was what?

A. Seaworthy.

Q. She was fit?

A. Yes.

Q. How would your capacity for steering, with your engines in perfect order and the three tugs, compare with your ordinary capacity if your rudder had been in perfect order and you had had no tugs? Would it be easier to handle your ship with her rudder and her engines in perfect order, or with her rudder lashed and her engines in order and three tugs to assist her?

A. I think it must be the same. I may not understand you right. We had three tugs and no rudder and no engine——

Q. No—three tugs, your rudder lashed amidships and your engines going. Would it be easier to handle her without the tugs and with your rudder, or with the tugs?

A. I think it must be the same—must be the same.

Q. After you left the bridge at 2.30, when did you next come on the bridge?

A. 4 o'clock in the morning.

Q. The ship was then ashore down at the Lesum?

A. She was ashore, yes.

Q. You know nothing about what happened between the time you went off the bridge and the time you came back again?

A. No.

Q. While you were on the bridge, before you went below at 2.30, did you pass some dredges and small boats in the river?

A. Yes, I remember we passed two dredges and one small boat.

Q. Did you have any trouble in going by them?

A. No, no trouble.

[fol. 333] Q. You testified before the Seeamt in Hamburg?

A. Yes—in Bremerhaven.

Q. The record before the Seeamt has been offered by the other side, and what purports to be a copy of your evidence contains this answer, "I wondered at the Hoheweg not being able to hold the head of the 'Isis'." Please state whether or not that is a correct statement of your evidence.

A. I think that must be a mistake, they have changed it or mixed it up—the Seeamt changed it. It may be later—I say later when the ship was on shore that I know nothing about anything, maybe then I say that, but not before.

Q. That is, you may have spoken about the Hoheweg after they were pulling you off the strand?

A. Yes.

Q. But while you were in your bunk fast asleep, you knew nothing about what the Hoheweg had done?

A. No, nothing about it, no.

Recess taken to 2.30 p. m.

After Recess, 2.30 p. m. December 10, 1930.

Present: As before.

Fritz Schier resumes the stand.

Cross-examination.

By Mr. Longley:

Q. Mr. Schier, prior to the time you came on watch that morning going up the Weser River, you had had no trouble whatever, I take it, with your steering gear, had you?

A. No.

Q. After the ship hit the bank, in sliding off the other side of the river, you have told us that you had very sub-[fol. 334] stantial trouble with your steering gear, is that not so?

A. Well, she always swing to starboard.

Q. You knew then, did you not, at that time, that your rudder had in some way become damaged as a result of the impact of the stern of the ship against the river bank, is that not so—as a result of the stern of the ship hitting against the river bank—you knew that was the fact?

A. That was the fact, yes.

Q. You have told us, in answer to Mr. Haight's question, as I understood it, that the blow against the river bank, when you slid off, was not a hard blow—did you not say that?

A. No, it was not a hard blow, the ship was in the mud, it was run over and touched the ground there, swinging over to the port side.

Q. You kept the logbook, didn't you—the logbook is kept on a German ship under your supervision?

A. Yes.

Q. After the ship was put in drydock at Bremen, after the first stranding and prior to the second stranding, I understand you didn't make any examination of the rudder at all, is that true?

A. I, no.

Q. You didn't leave the ship's deck at all?

A. No.

Q. So you don't know what condition the rudder was in?

A. No, I don't.

Q. After the second stranding, it is my impression from your testimony, that you made a careful examination of the quadrant where you had tightened the screws, is that so?

A. Yes, the engineers had tightened the screws.

Q. They had been tightened?

A. Yes.

Q. And the screws had not been changed in any way?

A. No.

[fol. 335] Q. They were just as tight as they had been when the ship left Bremen, is that so?

A. Yes.

Q. And you made a very careful examination?

A. Yes.

Q. What was the purpose of your examination—why did you do it?

A. I did it on my own interest to see that everything was all right.

Q. I can understand that these things would be of interest, but what was your particular interest in examining these screws in the quadrant?

A. To prove that it is all fast.

Q. Why did you want to prove that it was all fast?

A. We want to have no more damage going down the river.

Q. You were going to drydock then, weren't you?

A. What time do you mean?

Q. As I understood your testimony, that you gave in answer to Mr. Haight's questions, you made a careful examination of these screws, after the second stranding, before going into drydock?

A. Yes.

Q. Isn't that so?

A. Yes.

Q. That is what I am talking about. Why did you make such a careful examination of those screws at that time?

Mr. Haight: Do you understand the question, Mr. Schier?

The Witness: Yes.

Q. Well, what did you have in mind when you went and examined these screws?

A. We do it all the time, everything we do and what we do, and I fix something, I go later and see that everything is all right—do it every time.

Q. But there was no particular reason—just that you [fol. 336] wanted to see everything was all right?

A. Yes.

Q. And there was no distortion or moving of the screws or anything?

A. No.

Q. You agree with me, do you not, Mr. Schier, that that is so, that there could not have been any blow caused to the rudder after the screws were set at Bremen—doesn't that necessarily follow?

A. You mean that the rudder, other time would touch, that it wouldn't——

Q. Inasmuch as you found that the screws were not distorted or had not been moved in any way so that they were in exactly the same position after the second stranding as they were when they were fixed at Bremen, it necessarily follows, does it not, that the rudder had not been subjected to any blow after the screws had been fixed at Bremen?

A. What do you mean "subjected"?

Q. Well, not received any blow.

A. Oh, yes.

Q. That does necessarily follow, does it not?

A. There wasn't any blow.

Q. There was not any blow?

A. No.

Q. And you are convinced of that, as a result of your examination of these screws on the quadrant—that is the situation, isn't it? Don't you understand what I am getting at?

A. I don't know what you mean.

Q. Perhaps I am using some unfortunate words here. I will rephrase it a little bit. You know that the rudder had not received any blow because of the fact that these screws were in the same condition as when they had been placed at Bremen, isn't that the situation?

Mr. Haight: Objected to. The witness has testified that [fol. 337] between 2.30 and 4 o'clock he was sound asleep. He can't tell anything about what happened during that time.

Objection overruled.

Question repeated.

Q. Don't you understand the question, Mr. Schier?

A. I don't know what you mean.

Q. It is difficult for me to see how I can express it more simply.

Question repeated.

A. They were in the same condition when we came back to Bremen.

Q. Well, that establishes what I am getting at, Mr. Schier—that establishes, does it not, that the rudder had not received any blow?

Mr. Haight: Objected to as purely argumentative.

Objection overruled.

A. No.

Q. It does not establish it?

A. What do you mean—establish?

Q. That proves, does it not, that the rudder had not received any blow after the screws had been tightened?

The Commissioner: Mr. Schier, the screws had not moved in any way?

The Witness: Not moved.

The Commissioner: Now, does that show that the rudder couldn't have moved or been hit in the meantime?

The Witness: It could not move.

The Commissioner: Could the rudder have been struck? [fol. 338] Would that have showed in the screws?

The Witness: No.

Q. It would not show in the screws if the rudder had been struck?

A. It would show in the screws if the rudder had been struck, yes, it would show.

Q. Then, if the rudder had been struck, the screws would show it?

A. The screws would show it, yes.

Q. And the screws didn't show it?

A. No.

Q. It was a clear night, with the moon shining, I understand, when you left Bremen?

A. Yes.

Q. And you have told us that the river is well lighted?

A. The river is well lighted, yes.

Q. And you can see the banks?

A. Yes.

Q. What banks do you refer to that you saw there—you mean the banks above water, of course, don't you?

A. I mean that the banks on each side of the river.

Q. The channel where your ship could navigate naturally was quite a distance, was it not, from the bank that you could see above water?

A. I don't know what banks you mean.

Q. Let's put it this way—I want to know what banks you mean, Mr. Schier.

A. I saw this bank here (indicating on Respondent's Exhibit 9).

Q. You mean, do you not, where the land comes up out of the water?

A. Yes.

Q. Well now, the channel that the ship can navigate in does not extend up to the bank, of course, does it—you know what the word "channel" means?

The Commissioner: The edge of the channel and the bank are not in the same place, are they?

[fol. 339] The Witness: They are not in the same place?
The Commissioner: Are they?

Q. Your ship can't sail right up to the bank, can it—to the water's edge?
A. No, it can't.
Q. You have a channel?
A. We have a channel, yes.
Q. Well now, there was no way that you could tell at night-time where that channel extended, was there?
A. What is "extended"?
Q. Where the channel was?
A. (Referring to Respondent's Exhibit 9.) We could see it on the light.
Q. That is what I am getting at. Do you hold a pilot's license for the Weser River? That is a simple enough question. Are you a pilot for the Weser River?
A. No.
Q. You hold no license for being a pilot, do you—you are not authorized to be a pilot?
A. I — not, no.
Q. And have you ever yourself navigated a ship up the Weser River?
A. Not myself, no.
Q. Have you ever been master of a ship?
A. No.
Q. The six or eight times that you have sailed on the Weser River, you have sailed merely as a sub-officer, is that not so?
A. Yes.
Q. Did you at this time, or any other time, have any knowledge, by lights or any other means, where the channel in this river was—you, personally?
A. No.
Q. You personally knew nothing about the currents in that river, did you—do you know what the word "current" means?
A. Yes, I know that. I don't know how it runs.
[fol. 340] Q. You don't know how the currents run?
A. No.
Q. And you didn't know then?
A. Yes, when we started down I know how the current runs.

Q. You knew how it was running while you were sailing?

A. Yes.

Q. But I mean, speaking generally, you know nothing of what the currents were in the river?

A. No.

Q. You stated, in answer to Mr. Haight's question, that while you were on the bridge, after leaving Bremen up to the time that you retired—went to bed at 2.30—that there was no trouble with the steering gear?

A. No.

Q. As a matter of fact, during that period, you had no occasion, did you, for your ship to go to port?

A. What means "occasion"?

Q. You had no reason to steer your ship to port?

A. No.

Q. And you had no trouble with the steering of your ship?

A. No trouble with the steering.

Q. And the steering of your ship, during that period while you were on deck, was accomplished—was carried out, I mean—by maneuvering the tugs and maneuvering the engines—do you know what "maneuvering" means?

A. Yes, I know what maneuvering is.

Q. That is the way you steered the ship?

A. Yes.

Q. That is the only way you had?

A. That is the only way we had—and our own engines.

Q. You have expressed the opinion here that the ship was seaworthy when she sailed from Bremen—that was your testimony, wasn't it?

A. Yes.

Q. Well, how do you feel justified in expressing any opinion on it, Mr. Schier, when you didn't know what con-[fol. 341] dition your rudder was in?

A. The other people knew what condition the rudder was in.

Q. Then your opinion is based on what the others told you of the conditions they found?

A. Yes.

Q. You spoke of passing, I think, three vessels after sailing from Bremen, while you were on the bridge?

A. Yes.

Q. Those vessels were anchored, were they not?

A. Two dredges.

Q. They were anchored?

A. The dredges were anchored, yes.

Q. You had no occasion to change the course of your vessel whatever, in passing any of those vessels, had you?

A. I can't remember that.

Q. You cannot remember it?

A. No.

Q. But you can't remember that you did change your course, can you? If you can't, say so, it is quite all right.

A. No.

Q. The master was actually directing the navigation of the ship?

A. Yes—and the pilot too.

Q. Mr. Schier, I show you what, at least, purports to be a transcript of your testimony before the Seeamt at Bremerhaven. Will you read this through?

Mr. Longley: The witness is examining the German original of Libellant's Exhibit 1.

Q. Mr. Schier, will you read through that transcript, which purports to be your testimony, and tell us what part, if any part of it, you now claim is not the truth of what you said?

A. Here is something about—I think this one—the [fol. 342] Seeamt must make a mistake here and change that—that is the one that——

Q. That is the sentence where it says, "It surprised me to see that the Hoheweg could not hold the bow of the "Isis"?

A. Yes. Maybe I say that later when the ship bump on shore.

Q. Have you read it through?

A. Yes.

Q. Is there anything there that you claim is not the truth other than that sentence that you have just pointed out to us—other than that sentence, is everything all right?

A. Everything all right.

Q. Except that sentence?

A. Yes.

Q. And the reason why you say that sentence is not right is because you were asleep after 2.30?

A. I was asleep after 2.30 until 4 o'clock.

Q. Well, there is nothing wrong with that sentence, if your tugs had difficulty holding the bow prior to 2.30, is there? A. I didn't say anything about any tugs having any trouble with the steering of the ship, I didn't see that.

Q. Will you find in here, Mr. Schier (handing witness log-book) the entry with relation to the first stranding? I am interested particularly, Mr. Schier, in the language which describes what the ship did when she slid off the bank.

Mr. Haight: The first stranding down at kilometer 27.

Q. You have an entry in there that talks about her sliding off the bank, and I want you to read us in English, if you can, the translation of what that entry says. May I ask you first—is that your handwriting?

A. No, that is not my handwriting, it is the third officer's. [fol. 343] Q. You can read it, nevertheless, no doubt?

A. Here.

Q. What does it say there about the force of the blow?

Mr. Haight: Translate the entry.

A. I don't know what it is in English. The ship was from the current going up to Bremen—the current—and with the stern was heavy "furchtbarer Gewalt".

Q. Is it your position that these German words in that logbook are consistent in their meaning with your testimony that she hit but lightly against that bank? Do you know what I mean?

A. Yes, I understand what you mean, but I say, when I say "blow", I understand blow when it goes heavy.

Q. What does "furchtbarer Gewalt" mean?

A. Heavy—it is the same.

Q. Then your logbook describes it as a heavy blow?

A. There is no blow there.

Q. Describes it as a heavy impact—heavy striking—doesn't it?

A. Yes.

Q. You told us it was a very light striking.

A. It means light, it goes in the mud—it can't be a blow—she goes around in the mud, and the ship is going over. It may be hard—but it was——

The Commissioner: Whatever it was, it was "furchtbarer Gewalt"?

The Witness: Yes.

The Commissioner: And what does "furchtbarer Gewalt" mean—is that gentle, light, heavy, severe or——

The Witness: Heavy. You see when I mean "blow", is, when she comes to a rock, that means blow, but not in the mud.

[fol. 344] Redirect examination.

By Mr. Haight:

Q. When the ship swung over against the bank, the stern hit as it would hit into soft mud and not against a stone pier or against rocks, is that what you mean?

A. Yes, that is what I mean.

Q. The stern did strike the bank hard enough to give your ship a list to port?

A. Yes.

Q. You told us that?

A. Yes, that is what I mean.

Q. But you were conscious of the fact that your rudder and your stern had hit into a soft substance?

A. Yes.

The Commissioner: Which quarter took the ground on that side—the port or the starboard quarter?

The Witness: The port quarter touched the ground.

The Commissioner: And she listed to port?

The Witness: Yes, she listed over to port.

The Commissioner: Do you know how the helm was at that time?

The Witness: No, I can't remember.

The Commissioner: You have described the way the rudder was made fast with the wires, and the way the quadrant was set up with the screws. Do you know which was done first—did they make the rudder fast and then set up the quadrant, or did they first set up the quadrant and then make the rudder fast?

The Witness: I think they do at the same time, one engi- [fol. 345] neer inside of the wheelhouse and one on deck working, lashing fast.

The Commissioner: The two gangs were working at the same time?

The Witness: Yes.

The Commissioner: The engineers on the quadrant and the other people on deck?

The Witness: Yes, my people on deck.

Q. As you were making the lashings fast to the rudder, from whom did you receive your orders?

A. From the man who was in the boat watching that rudder from the dock.

Q. Where was the captain?

A. I think he was standing on the dock, I think he was not in the boat.

Q. I understood, in answer to my question at first, that you examined the screws in the steering engine-room as they were pulling your ship off from the ground at the Lesum—when the tugs were pulling her off, is that right?

A. That is right.

Q. That was before you started to go back up the Weser to Bremen the second time?

A. Yes, when the tugs take us down.

Q. When they started to take you up the river to Bremen?

A. Up the river to Bremen, yes.

Q. Do you know anything about what happened to the "Isis" while you were asleep?

A. No.

Q. You have said two or three times that the screws in the quadrant were still tight.

A. Yes.

Q. You have also said that if the rudder had been struck, the screws would have shown it?

A. Yes.

[fol. 346] Q. Now, how would the screws show it?

Mr. Longley: I object to my brother cross-examining his own witness.

Objection overruled.

A. We can see on that paint that is on the quadrant.

Q. The screws would show it if the quadrant had been moved——

A. Yes.

Q. (Continuing:) and the screws had held?

A. They would show it.

Q. But if the screws were tight enough to hold the quadrant, how could you tell whether or not the rudder had touched bottom?

Mr. Longley: I renew my objection, cross-examining his own witness.

Objection overruled.

A. Then we cannot see that the wire lashings, maybe you can see it there, but I don't think so.

Q. When your ship stranded the second time at the Lesum, you had your screws tight on the quadrant?

A. Yes.

Q. You had your lashings made fast on both sides?

A. Yes.

Q. Now, the captain of the "Isis" has testified that before you came on the bridge, when you were in your room

Mr. Longley: Objected to, telling the witness what the captain has testified.

Objection overruled.

Q. The captain has testified that before you came on the bridge, the stern of the "Isis" touched the bottom. If the [fol. 347] lashings were strong enough to hold, and if the quadrant screw was tight enough to hold, how could you tell whether or not the rudder had touched something?

A. The rudder can't move, something would be gone if the rudder had touched the ground.

Q. If the lashings were strong enough to hold, the rudder wouldn't move, would it?

A. No, it can't move.

Mr. Longley: Objected to. I submit the witness has given a fair answer. I object to any further cross examination of this witness.

The Commissioner: I don't think it is necessarily cross-examination. These are new matters which you brought out. There is no reference to this point on the direct examination. I overrule the objection.

Q. And as I understand your testimony on cross-examination, when you examined the screws on the quadrant, before you started up the river back to Bremen, you saw no paint off?

A. No.

Q. And no sign that the quadrant had been moved?

A. No, nothing.

Q. All you did was to look at the quadrant, and that is what you saw?

A. Yes.

Q. You were asked certain questions about having a pilot's license for the Weser, and what you could see of the banks of the river. Could you, in fact, in the night, with the moon shining, see the banks above the water so as to locate them practically, as you would have done by daylight could you actually see they were there?

A. Yes.

Q. Would there, in your opinion, have been any differ- [fol. 3481] ence in the navigation of the river at night, with the lights and the moon, and during the day time with the buoys in the daylight?

A. I think there is no difference.

Q. You have testified that until you went to bed, you had no occasion to change your course to port, as you went down the river?

A. Yes.

Q. Will you please look at the chart (Respondent's Exhibit 8)?

A. That is here (indicating).

Q. Now, from the point marked 2.11 until the cross in green ink, is it not true that the channel continuously turns to port?

Mr. Longley: Objected to. The witness has made a fair and direct answer, and you are trying to get him to change his testimony.

Objection overruled.

A. Yes, the river slightly goes to port.

Q. The river is bent to port all the way?

A. Yes.

Q. So that during that entire time, your general course was a slow swing to port?

A. Yes.

Q. And as I understand you, you made that swing without the slightest difficulty?

A. Yes.

Recross-examination.

By Mr. Longley:

Q. If I understand, Mr. Schier, you feel that navigation in narrow waters at night-time can be carried out just as easily as navigation in narrow waters in the daytime?

A. Yes.

Mr. Haight: Lighted as the Weser is, with the moon shining?

The Witness: When it is clear weather, you can see the lights and see everything.

[fol. 349] Q. Do they not have shadows on the Weser River, Mr. Schier?

A. I don't see that.

Q. Never saw a shadow on the Weser River?

A. No.

Q. You know what the word "shadow" means?

A. Yes, I know what "shadow" is.

Q. Are we to understand that there are brilliant flood lights the length of the Weser River, so that it is as light as in the daytime?

A. Yes.

Q. Just as light as in the daytime?

A. Just as light as in the daytime, of course, when it is clear weather, and all the lights burning.

Q. Are you quite understanding what you are saying?

A. Yes, I say there is no difference on a clear night sailing than in the daytime.

Q. I don't want to take advantage of your misunderstanding what you are saying. You have just said that it is just as light there in the nighttime as in the daytime. You don't mean that, do you, because I must confess I have never seen a place as light in the nighttime as in the daytime, out in the open. You can't mean that, Mr. Schier. How close together are the lights along the bank of this river?

A. I can't tell you that.

Q. You want to stand on that answer to my question—that you consider that it is just as easy to navigate the Weser River at night-time as it is in the daytime——

A. Yes.

Q. (Continuing:) because of the profusion of lights?

A. Yes.

Q. And there are no shadows there, because of the great illumination?

A. About the shadows, I can't remember that.

Q. Did you examine the lines to this rudder after the second stranding?

A. What—the rudder?

[fol. 350] Q. Yes, the wire cables that you had down to your rudder—did you examine them after the second stranding?

A. Yes, they were not touched.

Q. They had not been touched?

A. They had not been touched.

Q. Were not strained in any way?

Mr. Haight: Stretched—pulled out—loose.

A. No, absolutely tight.

Q. They had not been affected in any way?

A. No.

The Commissioner: What examination did you make of these wires, to find out that they were not stretched?

The Witness: I was standing with my foot on the wire, and see that it is tight.

The Commissioner: After you set them up with these tackles, how were they made fast—just bent around the bitts?

The Witness: With wires—goes around the bitts, and on the end of the wire it gets smaller—we can take it around and make it good fast, just like a rope.

The Commissioner: But the wire itself was made fast right on the bitts?

The Witness: Right on the bitts, yes.

The Commissioner: How much of the wire was inboard?

The Witness: Ten or fourteen yards on the bitts.

The Commissioner: The wire came in through a fair leader, didn't it—chock?

The Witness: Over a lip, yes.

[fol. 351] The Commissioner: How far was the lip from the bitt?

The Witness: About one yard, maybe a little bit more, I can't remember that so——

The Commissioner: And you tried the wires by stepping on that part of them?

The Witness: Yes.

The Commissioner: That was all the examination you made?

The Witness: Yes.

The Commissioner: Did you make that at the same time that you went down and examined the screw on the quadrant?

The Commissioner: Which did you do first, do you remember?

The Witness: At the same time, yes.

The Witness: Felt that wire.

The Commissioner: Were you afraid that possibly one or the other had loosened up?

The Witness: No.

The Commissioner: But you did examine them very carefully?

The Witness: Yes.

Redirect examination.

By Mr. Haight:

Q. Mr. Schier, you have been asked whether it was as light at night as it would be at day. You have answered that you could navigate as well, as I understand it. Could you have read a newspaper on the bridge at half past one, when you started down the river?

A. By that moonshine, yes.

Q. Was the moon as bright as that?

A. Yes.

Q. Well, I will repeat the first question I put—was there, [fol. 352] in your opinion, with the weather clear and the navigation lights all showing in the river, any difficulty in navigating the Weser, the night that you started out with the "Isis"?

Mr. Longley: Of course, I understand it goes to the weight of the witness's testimony, but I renew my objection that he has never navigated the ship and knows nothing of the currents, and his opinion is not entitled to any weight whatever.

Objection overruled.

Q. Was there any difficulty—night or day?

A. No, there is no difficulty.

Adjourned to 11 a. m., Monday, December 22, 1930.

Further hearing held at the office of the Special Commissioner, No. 44 Wall Street, New York City, December 22nd, 1930.

Present as before.

OFFERS IN EVIDENCE

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

Mr. Longley: I offer in evidence as Libellant's Exhibits C, D, E, F and G, five stipulations between the parties offered in the respective actions numbered 1 to 5 inclusive, the parties in each action being Louis H. May, libellant and Hamburg-American Line, respondent.

(Received and marked in evidence.)

Mr. Haight: I offer on behalf of the Hamburg-American Line depositions taken in Hamburg, with the exhibits, a [fol. 353] book of 124 pages; the deposition of Paul Krueger, master of the "Isis", a book of 130 pages; deposition of Fritz Schier, pages 131 to 170. The exhibits are 10 in all, but Exhibit 2 is permanently missing, the first exhibit was numbered 1 and the second was No. 3, so there is no No. 2.

(The Hamburg testimony of 124 pages received and marked in evidence as Respondent's Exhibit 13. Offered with that are Exhibits 1, 1-a, 3, 4 and 5, already marked August 14th, 1930. The deposition of Paul Krueger is received and marked in evidence as Respondent's Exhibit 14.)

Mr. Haight: With his deposition I also offer Exhibit 6 the blueprint, 7 the maneuver book, 8 the photostat chart, 9 official Government chart, 10 stowage plan, marked October 9th, 1930.

(Received in evidence.)

Mr. Haight: I offer in evidence as Respondent's Exhibit 15, the deposition of chief officer Schier, no exhibits attached.

(Received and marked.)

Mr. Haight: I also offer as Respondent's Exhibit 16 the general average statement of Schmidt & Prosch, which

shows what cargo was on board, the values of the cargo, the value of the ship etc.

Mr. Longley: What is the purpose of offering it, of itself it wouldn't be admissible.

Mr. Haight: The purpose is to show what the comparative values were between hull and cargo.

Mr. Longley: I object to it being offered in evidence for [fol. 354] the reasons Mr. Haight mentions, being quite incompetent, or irrelevant, let us say.

The Commissioner: I understand you make no objection as to the method.

Mr. Longley: No, I am willing to concede that is the general average adjustment as stated by the German adjuster, but I object to the relevancy of the offer for the reasons Mr. Haight has mentioned.

The Commissioner: Without formally overruling your objection, I shall let it go in, not as evidence of any of the basic facts that may appear in it, but as evidence that the average adjuster found those to be the basic facts—in other words, if the contributory value is stated in there as so many dollars, I shall not accept that as evidence that it was the correct contributory value, but as evidence that the adjuster found that contributory value and computed average accordingly.

Mr. Longley: My objection goes deeper than that. My brother—if I understand his argument—is offering it for more than that, he is offering it for the purpose of forming a basis of arguing before you that the position taken by the respondent was reasonable because of the cost and expenses of this and that, and I submit that is irrelevant, that is really the basis of my objection.

The Commissioner: It may be some evidence, I shall have it marked in evidence.

Mr. Haight: I do not understand that Mr. Longley questions the accuracy of the figures.

The Commissioner: Of the computation.

Mr. Haight: And that the values have been properly given by his client to the adjuster and so stated.

Mr. Longley: I have not examined the adjustment and am not in a position to admit it is, but so far I am unaware [fol. 355] that the underwriters have raised any question as to the adjustment, but I don't want it understood that

I am binding my clients by so agreeing, but I know of no objection.

Mr. Haight: Unless you find to the contrary, the figures may stand?

Mr. Longley: That is not in issue just now.

(Received and marked Respondent's Exhibit 16.)

Mr. Haight: I offer as Exhibit 17 a stipulation which has been signed to the effect that if the engineers of the "Isis" had been called, they would testify that the orders occurring in the maneuver book were actually received.

(Received and marked Respondent's Exhibit 17.)

Mr. Longley: I offer in evidence as Libellant's Exhibit A translation of the record of proceedings before the Board of Marine Inspectors at Bremerhaven. As Libellant's Exhibit B, translation of the findings of the Court at Bremerhaven, both translations having been agreed upon between the parties as correct.

(Received and marked Libellant's Exhibits A and B.)

Mr. Haight: I suggest that we stipulate that the deposits made by the assignors of the libellant represented 20 per cent of the value of their cargo.

Mr. Longley: I think that my brother's statement is correct, that the general average deposits were 20 per cent of the estimated contributory values, but while that is my [fol. 356] understanding I should like to correct it if it is not so.

Mr. Haight: Subject to correction?

Mr. Longley: Yes. It is my understanding that since this proceeding commenced, 50 per cent or approximately 50 per cent of the original 20 per cent deposit taken covering both strandings, has been returned, but I am not in position to state that it has been returned in each of the cases that are in suit here, and it should also be understood that when I say 50 per cent I only mean approximately 50 per cent.

Mr. Haight: My understanding was that they had actually returned one-half of the deposits to everybody. When the Seeamt record was offered on the other side, Mr. Griffin objected to it, I am going to withdraw those objec-

time. If the record means anything on the facts we are not trying to hide them. We withdraw our objections.

WILLIAM G. MCLENNAN, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Longley:

Q. You live where?

A. 10 Park Avenue, Port Washington.

Q. Will you give us a resume in your own words of your life work, what papers you hold and everything of that kind.

A. I hold a master's license since 1885; I was at-sea from 1887 to 1917, out of which time I was 30 years master of sail and steam.

Q. You worked up through the various grades before you [fol. 357] were master, I assume?

A. Yes, from '77 to '87 I was working up.

Q. Since you left the sea, what have you been doing?

A. Marine surveyor. I commenced marine surveying in either August or September 1917.

Q. In your work as marine surveyor, have you had occasion to survey many damaged ships of all sizes?

A. I have.

Q. Have some of them had damage repairs?

A. Some have.

Q. What tonnage were the ships that you have commanded?

A. Well, the first one was a very small one, about 500 tons, carried 1,000 tons—do you want the deadweight—about 1,000 tons deadweight, up to 10,000 tons deadweight.

Q. I assume the larger ships were toward the end of your command?

A. Yes, somewhat toward the end.

Q. Have you had occasion to be towed or assisted by tugs many times during these operations?

A. Not very often, I was once towed from Maderia to Barry.

Q. How about harbor or river operations?

A. Well, you have tugboats often on the river assisting you.

Q. Have you read all the testimony in this case covering the testimony taken in Hamburg, also the testimony of the master and chief officer of the "Isis"?

A. I have.

Q. I want you to assume, Captain, a ship known as the "Isis" which according to Lloyd's Register of Shipping, is 376.2 long, 51.8 beam, depth of hold 25.9, it appearing from Respondent's Exhibit 6 that her molded depth is 28 feet 3¾ inches, approximately 7,000 tons deadweight carrying capacity, which I understand makes approximately 10,000 [fol. 358] tons displacement, that her engines have a total horsepower of 2,400, that she is a twinscrew motorship with her motors or engines in good condition. Assume that her rudder blade is intact, but by reason of a bend in her rudder stock, the rudder is put amidships, is lashed as firmly as possible with wire rope, that the quadrant is made fast with clamps or screws; assume that she is at Bremen on the Weser River, which is a narrow channel with changing currents and sharp bends, which it has been testified by those in a position to know, is difficult to navigate under the most favorable conditions. Assume this vessel starts from Bremen in tow of three tugs, one of 1,080 horsepower on a hawser at the bow of 30 to 35 meters, one of 800 horsepower at the port made fast at No. 4 hatch, one of 810 horsepower at the starboard also made fast at No. 4 hatch. Will you tell us whether a ship sailing under those conditions can be navigated with greater or less safety than if her rudder were intact and in use and she was sailing under her own power alone, having in mind that the ship is sailing on a voyage from Bremen down the Weser River through the North Sea to the Elbe and then up that river to Hamburg?

A. She is not so safe as if she was under her own power.

Q. Why it that so, Captain?

A. For one reason, you can handle the ship better under your own steam. The master or pilot on deck has command of her, whereas if he has tugs on her in that position, he has to depend on the tugs obeying his orders explicitly, and when he gives an order to a tug to go ahead or astern, he has no knowledge that that is being done, he is only just giving the orders, then besides that the tug

ahead in such a narrow river as that, with even a 30 to [fol. 359] 35 foot hawser or tow rope cannot maneuver to swing a ship—she hasn't got room in a narrow channel like that to maneuver to swing or take a shift from starboard to port as the case may require, and besides that, your ship will always steer better with her own rudder than with tugs.

Q. The testimony here is that the system followed was to shout orders to the tugs through a megaphone—perhaps it virtually speaks for itself, but I will ask you as the speed at which you can maneuver a ship following that system and the speed at which you can maneuver a ship by giving signals from the bridge, using your own wheel and your own rudder to the steering engine?

A. The maneuvering of the rudder is on the bridge right alongside you. The wheel is on the bridge connected up with the rudder aft, so that you have it right at hand to maneuver as you wish.

Q. Speaking generally, Captain, whatever the number of tugs employed, is a vessel more readily and safely navigated under her own power with the use of her own rudder, or with the rudder lashed and the use of tugs?

A. More successfully under her own power.

By Mr. Haight:

Q. Always?

A. Always.

By Mr. Longley:

Q. Assuming the same ship sailing under the same conditions as I have outlined in the long question, what can you say concerning the relative safety of sailing in the daytime and at night?

A. Much more safe in the daytime.

[fol. 360] Q. Why is that so?

A. In narrow waters like any of those rivers, you can see the bank in the daytime, you can judge your distance off exactly—at night time with lights, you cannot. There may be a shadow and the channel does not extend into the banks so that therefore in the daytime you have much better visibility right through.

Q. Well assume, Captain, that the moon was the brightest you have ever seen a moon, that the leading lights were all burning brightly, does that affect your opinion at all?

A. Not for more safely than daytime.

Q. You have spoken of the shadows, how about detecting the currents?

A. You can't at night, whereas in the daytime where there are buoys in the river or even a current running you can often see it, but where there are buoys you can see the current running past that buoy which is chained, and you can see whether it is running straight because if running a little to starboard or to port, the buoy is bound to swing to a certain extent to that way.

Q. Is it possible to see any such condition at night?

A. Not until you are right close on it, then the weight of the ship may swing the buoy to reverse.

Q. Which is the easiest time to see whether your ship is shearing or not, is that best seen at daytime or in the night time?

A. Well, I don't know that there is a great deal of difference to see her start shearing if you are very watchful, but I would prefer the daytime at any time to night.

Q. Is is or is it not important to ascertain quickly that your ship is shearing?

A. Pick her up the moment she starts to sheer.

Q. With a ship in the condition that I have described in the [fol. 361] prior question, what in your opinion dgl ordinary prudence, such prudence as is usually employed by seafaring men, require as to the time of sailing?

A. Sail in the daylight.

Q. Is that particularly so with reference to sailing in narrow waters?

A. Much more so than in open waters.

Q. Captain, assume the story told by the master in the testimony which you have read as to the courses, times and speed, etc. are all true with relation to his voyage from Bremen down the Weser River, what have you to say concerning his speculation or opinion that the bend in the bottom of the rudder found after examination of the ship in drydock subsequent to the second stranding, resulted from the stern of the ship hitting something just before the second stranding?

A. Am I to take his evidence?

Q. Yes.

A. Reading his evidence I don't see how it was possible for his ship to strike as he says the second time.

Q. Captain, why is that so?

A. Because he says the ship was swinging to starboard at the time that she struck her rudder on the port side and he was outside of the buoy, he distinctly says that he was in the channel. If there is anything in that channel it is very strange that the Germans would not have found it before or since and you would have heard of it. There was nothing there for that ship to strike when she swung her head to starboard, her stern is naturally going off to port, how can she strike anything and bend her rudder as they say and not leave even a scratch on the shoe or any other part of the ship.

Q. You may have noticed the testimony here of the chief officer is that after the second stranding he examined the [fol. 362] quadrant which had been held by—one witness said two screws, another witness said by one—he also examined the wire lines that led to the rudder, what have you to say as to his testimony as to those being found intact?

A. If that ship struck hard enough to bend her rudder blade as they state, she must have started something in the quadrant or lashings or the rudder plate.

Q. Could there be any impact sufficient to bend the rudder which would not affect the lines or screws of the quadrant?

A. That is what I say she was bound to do.

Q. What would be the result—if the rudder hit something sufficient to bend it—on the lines and screws of the quadrant?

A. It would either carry away the line or bend the slot that they express the line was in, or start the screw on the quadrant.

Q. Assume that she hit aft on the starboard bank just before this second stranding; assume that the rudder was hit, what effect would it have on the rudder blade, assuming first that your blade was absolutely straight prior to that time?

A. Bend it to port.

Q. Let us assume that the rudder blade was already bent to starboard.

A. Might help to straighten it.

Q. Could any such thing bend the rudder to starboard?
A. No, not if she struck on the starboard side

By Mr. Haight:

Q. Starboard side of what?
A. Of the ship—starboard side of the rudder.

By Mr. Longley:

Q. Having in mind that the rudder is not as low as the [fol. 363] shoe as shown in Respondent's Exhibit 6—which you have examined, Captain?
A. Yes I have.
Q. If the ship sailed over a shallow spot in the river, could the rudder be damaged without the stern frame being marked or damaged in some way?
A. I don't see how it could, I don't think there could be a lump that could hit the rudder and not the shoe or bottom of the ship.
Q. When a ship swings to port or starboard does she pivot sharply to her stern, or could a ship pass over a rock in a shallow spot without touching her and yet swing her bow to starboard so that the stern would swing to port slapping the rock against the rudder and nothing else?
A. If the ship was swinging to starboard?
Q. The bow swinging to starboard?
A. Then the stern must have been going to port, there was deep water right on the port side—that is admitted.
Q. Why do you say that is admitted?
A. Because the captain——

Mr. Haight: Trying to contradict a witness with somebody who doesn't know a blessed thing about anything, it is simply argument, not expert testimony at all.
The Commissioner: I think so.

Q. How severe a blow would be required to bend a rudder stock of 220-225 millimeters in diameter, about 10 inches?
A. It would be a very severe blow, I can't give you the pressure.
Q. Can you conceive a blow sufficient to have caused a twist in a rudder stock which has been testified to here was about 45 degrees, resulting from the first stranding which [fol. 364] would not have resulted in a twist in the rudder blade?

A. If she would make that much wouldn't she twist the blade?

Q. Yes.

A. She must have twisted the blade to do that.

Q. Captain, if you knew that a ship had hit with sufficient force against the bank so that you knew that your rudder stock was twisted in the way they say this rudder stock was twisted as a result of the impact of the rudder with the bank, what in your opinion does ordinary prudence demand in connection with your ship before she would be permitted to sail from a port like Bremen down the Weser and then up to Hamburg?

A. Make positive the rudder was in good condition.

Q. How?

A. Drydock your ship, pump out water sufficiently so that you can see the rudder blade, get down to the lock pintle, you will then be able to see the whole rudder—have to use a straight edge or line.

Q. What have you to say in relation to the testimony here as to whether or not the course pursued by the managers of the "Isis" was or was not prudent?

A. It was not prudent.

Q. How long would it take to take the rudder out of this ship while she was in drydock?

A. Well, I think they should do it in half a day or thereabouts, maybe a little more, a little less.

Q. So far as the rudder stock is concerned, can that readily be removed if it is twisted, without pumping water completely out of the drydock?

A. If you have the rudder blade off which connects underneath the counter, then you remove it—even the blade.

[fol. 365] Q. How much water would have to have been pumped out of the drydock to take the rudder blade out?

A. Sufficient to get at the wood lock as we term it.

Q. What is that?

A. The lock that locks the rudder from unshipping in the pintles.

Q. Examining this Exhibit 6, how far down would you have to have your water reduced in relation to the top arm?

A. Reduced just so you could get underneath to work, after you get that out disconnect your base (indicating the

upper pintle) sometimes in the upper, sometimes on the second.

Q. Does this plan show whether it is the upper or second?

A. I don't know whether it does, there is a mark there.

By the Commissioner:

Q. Did you say the wood lock is shown in this exhibit?

A. I don't know enough of that plan to say, perhaps you had better ask an engineer.

By Mr. Longley:

Q. It would either be the first top pintle or the second?

A. Or the second.

Q. How long would it take to do that—if you are in a position to tell us—how long would it delay the ship if you put her in drydock, assuming a drydock was available and just pumped out sufficient water so that you could take off the rudder blade, take out the rudder blade, take out the stock, have the rudder blade straightened or repaired and put it all back in again and get a new stock or have that one repaired so that your ship could sail?

A. I wouldn't like to say how long, it would depend on—[fol. 366] I would say Bremen or Hamburg could do it in as short a time as anybody, they are big shipbuilders, but I wouldn't like to give the time.

Q. Is it a particularly onerous undertaking to take the rudder out if you are able to get down to the lock pintle?

A. No.

Q. Or to take the stock out?

A. After the blade is out, no.

Q. You take the two out separately, I understand?

A. Take the blade out first, then the stock.

Q. There are bolts that you loosen that connect the stock and rudder?

A. A flange with bolts through it.

Q. If the rudder blade was to be taken off and the ship permitted to sail without any rudder, in tow of tugs, or if the rudder blade and stock were removed and thereafter repaired and replaced, would there be any necessity for discharging cargo?

A. I don't think so—I know there wouldn't.

Q. Which is safer and more prudent, Captain, to sail with a rudder lashed amidships and the quadrant braked

or remove the rudder and going down with tugs on a voyage down the Weser River and up to Hamburg?

A. I would prefer it without the rudder.

Q. Why is that?

A. I think the tugs would have more control of you than with the rudder, and particularly where you don't know—am I supposed to assume it is perfectly straight.

Q. Let us assume first it is.

A. There wouldn't be a great deal of difference.

Q. If you don't know what its condition is?

A. Then unship it.

[fol. 367] Q. If your ship has hit heavily aft and a serious twist in the rudder stock results, such as has been testified to here, or if it is felt that the ship would be endangered if she was to rest her whole weight on the blocks in drydock so that the whole rudder might be examined, what in your opinion does customary prudence demand as to the action to be taken?

A. Well, if you are afraid of your ship on the blocks you could take the water down partially, you wouldn't need to take it down only below the wood lock and disconnect your rudder and take it off.

Q. What have you to say, Captain, as to examination of the lower 3 feet of the rudder that lay under water, by feeling with the hands or arms under water, by poking it with a boat hook or stick, as to ascertaining anything down there on the rudder?

A. You can't feel it with the hands, I never saw a man with an arm long enough to feel to the bottom, it would have to be over 3 feet, and poking it with a stick, with a slight bend, you would never find it unless it was very very badly bent.

Q. Might there be a dangerous bend in the rudder blade under water which this type of examination might not disclose?

A. Yes.

Q. Might there be a dangerous bend in a rudder blade which a diver would not discover if he went under water and examined it?

A. I don't know, I wouldn't like to say exactly, but I would think a diver, if it was a bad bend, would see it, but a slight bend, he might not.

Q. If the rudder has to be left on the ship after such an impact, as I have referred to, what is the customary and prudent method which should be followed to ascertain if the blade is straight or has become bent?

A. Take and put the ship in drydock, take the water down [fol. 368] sufficiently to see the whole rudder.

Q. Then what do you do, examine whether it is straight or bent?

A. Put the rudder amidships, go right to the stern, if it has a certain bend you may see it, if not use a straight edge or line.

Q. Captain, if you are standing looking at the side of a rudder which is let us assume entirely out of water, and you are 20 feet above it as the master has said he was at the edge of the d[illegible] and looking down on the side of the rudder, can you see if it is straight or bent?

A. I wouldn't think so.

Q. What have you to say as to the lashing of the rudder with lines which run to the bitts, could those lashings hold vertically?

A. You can't have them firmly enough vertically to hold.

Q. What would hold the rudder firm under that condition?

A. The quadrant.

Q. If you are navigating a straight course and then change your course to starboard and you have a defective rudder which is bent to starboard, is that not the time it would be most liable to sheer? A. The bent rudder would help her to sheer.

Q. If the ship tends to sheer to starboard and it becomes necessary to make a sharp turn to port because of a bend in the river, is that or not the occasion when the ship is subject to the greatest danger of stranding?

A. It would be.

Q. Captain, if such an accident as has been testified to occurred here at the time of the first stranding, will you state whether or not it is customary for shipowners to secure seaworthy certificates?

A. Always.

Q. Did you ever hear of a seaworthy certificate being [fol. 369] secured without the certifying party seeing the ship?

Mr. Haight: That is not a question for an expert witness. I object to it.

The Commissioner: Sustained.

Cross-examination.

By Mr. Haight:

Q. Captain McLennan, having read the testimony, you understand that when it was found that the rudder stock in the "Isis" had been twisted, the underwriters in Hamburg who covered all of the hull and who covered a considerable part of the cargo were consulted—you understand that, don't you?

A. Yes, that is what I get from the evidence.

Q. You understand that they were told that it was proposed to lash the rudder amidships and tow down the river with two tugs—do you so understand?

A. I understand.

Q. And that the committee of underwriters who carried the risk agreed that that was the wise method of handling the situation, you understand that?

Mr. Longley: I quite understand that in cross examination a great deal of breadth of examination is permitted, but I submit it is entirely irrelevant what underwriters who are not interested in this suit in any way decided what should be or should not be done.

Mr. Haight: Underwriters are the only people who are interested.

The Commissioner: Mr. Haight's question is whether the witness has understood certain things from the record, [fol. 370] whether those things are material or not material is not at issue at present.

A. Yes, as I read the evidence.

Q. And that later after the underwriters had agreed that the ship should be towed with two tugs they actually added a third tug?

A. Yes, someone did.

Q. How often have you towed a vessel up and down the Weser River?

A. When you say towed, do you mean——

Q. How often have you been up or down the Weser yourself?

A. Twice.

Q. When was that?

A. A good many years ago.

Q. Tell me when.

A. I think it must be 20 or 25 years ago, I don't remember the date.

Q. What kind of a ship were you in?

A. A ship carrying 10,000 tons of cargo on one occasion, she was then called the "Hydaspes", I think the other one was the "Kelvin Grove".

Q. How big was the "Kelvin Grove"?

A. She carried about 7,000 tons.

Q. Did you go to Bremen?

A. We went to Bremen.

Q. You went up and down under your own steam?

A. Up and down under our own steam.

Q. Did you have any trouble?

A. Not that I remember.

Q. You understand that the repair people in Bremen were among those who surveyed the "Isis"?

A. So the evidence is.

Q. People who would have gotten the job if the repair work had been done in Bremen?

A. Yes.

[fol. 371] Q. They still said the boat was safe to tow?

A. Yes.

Q. You understand that the representative of the German Lloyd's was told the condition of the "Isis" and said "I will give the ship a certificate of seaworthiness"?

A. Yes, he was told it.

Q. And that he was told the truth about the boat, that her rudder was straight, and he then declared himself as ready to give the ship a certificate of seaworthiness?

A. Yes, he was taking another man's word for it.

Q. As to the fact as to whether the rudder was straight or not?

A. Yes.

Q. You have said that it is safer under certain circumstances to go by day than it is by night, that it is safer to have your own rudder than it is to have tugs—what I want to know is do you consider it always unsafe for a ship to proceed at night?

A. No, not unsafe.

Q. Well you see in this case we are not interested in what is mathematically the safest way of doing the thing. You are here as an expert to say that it is actually unsafe to go at night?

A. That was not what I said.

Q. Then you don't have any intention of saying that it is unsafe for a boat to go down the Weser or any other river at night?

A. I don't think it was safe for that boat under the conditions.

Q. You don't say that navigation at night is unsafe?

A. No.

Q. A ship that is capable of navigating properly may go at night just as well as in the day, may she not?

A. She may go at night, but not just as well as the day.

Q. Do you think it is negligence for a boat that is per- [fol. 372] fectly fit to navigate to undertake to sail at night?

A. Negligence on whose part?

Q. On the part of the owner or master or anybody who is responsible?

A. No, we have to do it at times.

Q. Certainly. Every ship in the world navigates by lights at night and by sun at day, if the sun shines?

A. Yes.

Q. And it is considered perfectly prudent to start a ship out at night if she is fit to handle at all?

A. I won't say that, if she is fit to handle at all.

Q. Let us suppose that the "Isis" had been perfectly in order, engines and rudder, would you have called it safe or unsafe for her to go down the river at night?

A. It ought to be safe.

Q. Then if the "Isis" with three tugs was even more manageable than she would have been with her own rudder and engines, it would have been safe for her to go at night?

A. She was not navigable.

Q. I am asking you if, as a matter of fact the three tugs did give her more steerage power, there is no reason why she shouldn't go at night?

A. The three tugs did not give her more steerage power.

Q. I know you disagree with me, I also disagree with you, but if the Court finds that you are wrong, and holds that the boat with these three tugs was perfectly fit to navi-

gate, then going at night would not be negligence, would it?

A. No, I don't think it would be negligence.

Q. Is there anything better in the world to steer by than range lights?

A. Nothing better if you can see them, no.

Q. Nothing better?

A. No.

Q. Wouldn't you rather have the range than the banks [fol. 373] along the river?

A. But you have the range day or night.

Q. Going down through the channel out to sea from New York you have lighted buoys on both sides of the channel, haven't you? Can there be any question about its being safe for a man to navigate a ship between those lighted buoys at night?

A. Not if he navigates there.

Q. You have seen the chart of the Weser River, I suppose?

A. I have.

Q. You have seen that every few yards there are lights on both sides of the river?

A. I have seen a number of lights.

Q. There shouldn't be any difficulty for a man steering between those lights if his boat steers, should there?

A. Not if his boat is steerable.

Q. This boat, according to Lloyd's 376 feet long, is a little ship, isn't she?

A. No, we don't call her a little ship.

Q. There are thousands of bigger ships, aren't there?

A. Yes, and thousands of smaller.

Q. For a question of towage 7,000 deadweight and about 4,400 gross is in no sense a big ship, is it?

A. No, not what we call a large ship today.

Q. Not a difficult ship for tugs to handle?

A. Well, if you know how they are handling them.

Q. Well, as ships go, she would be an easy boat to handle, wouldn't she, of that size?

A. If the ship was perfect she ought to be.

Q. Ships very much larger are towed every day, aren't they?

A. Towed or assisted.

Q. Towed every day when their engines don't work, when there is no steam on them?

A. Yes.

Q. With their rudders broken?

A. Yes.

Q. When their engines are disabled they are being towed all the time, aren't they?

A. Yes.

[fol. 374] Q. What did you assume to be the draft of this boat?

A. 23 feet 3, I think it was given or 23 feet 5—I wouldn't be certain of the 2 inches—aft.

Q. What draft forward?

A. About 18 and some inches.

Q. That is almost a perfect draft for handling a boat easy?

A. No.

Q. No, you don't like that draft?

A. No, too much drag—too much aft, we never put a ship that much if we can avoid it.

Q. If you had tugs made fast at No. 4 hatch on both sides, it would be easy to wing her bow, drawing that amount of water forward?

A. No, I don't know that it would, you have got to swing the stern too—both ends have to swing.

Q. Don't you consider it easier to swing the bow of a ship if loaded by the stern than on an even keel?

A. No, I do not.

Q. They haven't been in your experience?

A. I don't say an even keel—give her a little by the stern.

Q. Why?

A. Because she steers better.

Q. Why does she steer better if she has drag by the stern?

A. We don't consider that drag, but 5 feet we would.

Q. Why does she steer better when we have more drag astern?

A. I can't give you the reason, but that is generally the way we load ships, a little by the stern.

Q. Isn't it just because the bow swings easier if you have lesser draft forward?

A. No, that is not the reason.

Q. If you had more draft forward than you had aft, you couldn't swing the bow well, could you?

A. She won't steer so well then.

[fol. 375] Q. You don't think it makes it easier to swing the bow?

A. Not on a 5 foot drag.

Adjourned for luncheon until 2:15 P. M.

2:15 P. M. met pursuant to adjournment.

WILLIAM G. McLENNAN resumes the stand:

Cross-examination.

By Mr. Haight (continued):

Q. As I understand, Captain McLennan, you feel that it is not as safe for a boat to proceed with tugs as to go under her own steam?

A. No, I don't think so.

Q. Do you think it is always safer to be under your own steam?

A. Yes, you can handle your own ship, whereas under tugs you are under other people handling her.

Q. You think it makes it dangerous because you have to give orders to the tugs?

A. It takes a longer time to maneuver the ship, therefore, in narrow waters it may make it dangerous.

Q. It may?

A. In narrow waters, but not in the open sea.

Q. Is there any particular difficulty in giving your order from the bridge to the tugs?

A. Well, if you have tugs as this ship had, the captain distinctly says he took a megaphone, went to one side of the bridge, then went across to the other side and gave the order, I think that is in evidence.

Q. If you only had to give an order to one side it wouldn't be much of a task, would it?

A. No, it wouldn't be much of a task, but you don't know [fol. 376] then how much that order is being carried out, nor how quick.

Q. Well, you don't know what your engineers do down in the engineroom, do you?

A. Well, you can tell when the engines start.

Q. You can tell when the tugs' engines start?

A. No, not the same.

Q. You also say that a tug ahead couldn't be of real assistance in a narrow stream?

A. In swinging the ship.

Q. And I understood you to go the full figure of saying that a ship was never never could steer as well with tugs as she could under her own?

A. In my own opinion no, never.

Q. Suppose you had wanted to stop the "Isis" in the river you understand that the current was running up river, don't you?

A. Yes.

Q. Suppose you had wanted to stop the "Isis" in the river to let a ship go by, would you rather be without tugs or with tugs?

A. Well, you mean to stop very suddenly?

Q. No.

A. Just to stop naturally?

Q. To stop naturally, and hold your boat approximately head over the ground for another boat to come by?

A. Perhaps in a case like that you might have a little advantage in having tugs and also your engines.

Q. Why do you say perhaps, isn't it a sure thing you would be infinitely better with tugs?

A. You would have a little more power to go astern.

Q. You would have over 2600 more horsepower than you would have yourself?

A. Yes.

Q. You have double the horsepower of a ship like the "Isis"?

A. Yes.

Q. Is there any question of perhaps about that?

A. Well, I don't know that there is in that case.

Q. Don't you know, Captain, that you would be infinitely [fol. 377] better off with tugs in a stream like that with current running up, if you wanted to stop your boat say for somebody to go by?

A. That would be the only case.

Q. Never mind if that would be the only case, in that case you would be very much better off, wouldn't you?

A. You could stop and anchor.

Q. No, you would have your boat under better control, wouldn't you?

A. I don't know that you have any more than stopping.

Q. Well, the "Isis" as you know found another vessel coming up the river just before the "Isis" reached the "Leaumr"?

A. So the evidence shows.

Q. If the pilot of the "Isis" had ordered his ship to stop in the river, he could easily have done that with three tugs to hold him in position, couldn't he?

A. He ought to, yes.

Q. If his tugs were properly maneuvered he could stop his boat dead over the ground, couldn't he?

A. I would think so.

Q. Have you any doubt about it?

A. Yes, I have with the current there.

Q. With your long experience, isn't it a sure thing that if you had a current running up at the rate of 3 kilometers per hour, three tugs could hold the vessel in position in the river without the slightest difficulty and stop her over the ground?

A. Yes, they ought to.

Q. Anybody who understood how to handle tugs could have handled the boat under those circumstances?

A. Yes.

Q. You couldn't do that if the ship was under her own steam and had nothing but her own rudder, could you?

A. Yes, you could anchor also.

Q. You don't always like to drop your anchor in a nar- [fol. 378] row channel like that, do you?

A. You don't like to, but you have to do it.

Q. If you had tugs you wouldn't have to, would you?

A. I wouldn't think so.

Q. Are you not sure?

A. No, I am not sure, it would depend on how they were handled.

Q. If they were handled properly, three tugs of the size of these three could hold that boat without difficulty and wait for another ship to go by?

A. Yes, they could.

Q. That is one instance in which it is much better to have tugs than it is to have your own steam, isn't it?

A. You want that answered?

Q. Yes—that is one instance?

A. Yes, that is one instance.

Q. I suppose you have seen vessels docked here in New York?

A. Yes.

Q. They don't dock under their own steam, do they?

A. Some.

Q. How often does a ship of any size dock in the North River under her own steam?

A. Not often, only when she is compelled.

Q. Unless she waits for a dead slack tide she can't do it at all?

A. No.

Q. There is another case where it is infinitely better to have tugs than your own steam, isn't it?

A. This is on docking?

Q. That is another case where it is better?

A. It is better to have tugs, yes.

Q. In other words, whenever you want to make a quick turn with a vessel you do it much better with tugs than you do under her own steam with her rudder unassisted?

A. They are supposed to be an assistance, that is what you get them for.

Q. And in your experience they are of great assistance, aren't they?

A. They are assistance.

Q. When a vessel is going comparatively slowly and [fol. 379] must be turned, a tug is infinitely better than the ship and her own rudder?

A. Yes.

Q. All right, that is two cases. Now in your experience which is long, you have known many ships to be shifted from one dock to another, haven't you?

A. I have.

Q. Always use tugs, don't they?

A. Always use tugs.

Q. Why?

A. Many times they have no steam.

Q. Suppose they have steam, do they use tugs?

A. Yes.

Q. Why?

A. May keep the bow fast, swing her around, if coming around stern first swing her stern around.

Q. In other words if going to really handle a ship and you must swing her with comparative abruptness anywhere, a tug is very useful?

A. Very useful.

Q. Much more useful than the rudder unassisted by a tug?

A. Yes, in that case.

Q. That is a third case. Now when a ship has no steam, as you have referred to, you always have to handle them by tugs?

A. Yes.

Q. Do you think it negligence to do so?

A. No.

Q. Why shouldn't you always repair your ship before you try to tow her, if it can be repaired where it is?

A. I am not denying it.

Q. You are saying that it was not appropriate for the owners of the "Isis" to order her towed under these circumstances if they were to exercise proper judgment?

A. I say she should have been repaired.

Q. All right, why shouldn't every ship be repaired?

A. Give me an instance where they are not?

Q. What was the particular reason that this particular [fol. 380] boat could not be towed when every ship that has no steam can safely be towed?

A. Because they were not positive that the ship had a straight rudder.

Q. The question put to you is, assuming that the rudder is straight, that was Mr. Longley's question and that is the question on which I am cross examining. You say it is never safe?

A. Not as safe.

Mr. Longley: I asked him to compare, which he did, I didn't say it was never safe, that was not the question.

Q. Do I understand that in your judgment it is not negligent to tow a ship if she has no steam on her?

A. Where?

Q. Anywhere?

A. Well, there is some places she wouldn't want to, most places, you could.

Q. Most places you could?

A. Yes.

Q. You would tow her through all the narrow channels about New York, wouldn't you?

A. Yes.

Q. The Kill van Kull, Claremont, Black Tom and all the rest of the places through here, boats are towed continuously without steam on?

A. I don't know that they are without steam.

Q. All right, if you don't know.

A. No.

Q. Well, a damaged ship in your experience is very frequently towed to the repair yard and back and forth?

A. Yes.

Q. That you do not consider negligence, do you, generally speaking?

A. No, not negligent.

Q. Is there any distinction between a vessel that has no steam on her and a vessel with her rudder lashed, assuming the rudder is straight?

A. No, I don't know that there is.

[fol. 381] Q. You do know there isn't?

A. I say I don't know that there is.

Q. If you tow a boat without any steam on, her rudder is universally——

A. Universally amidships, but I have seen them often just keeping the rudder to steer.

Q. A boat with her engines absolutely out of order, if she has no steam of any kind aboard, then towing the boat with the rudder lashed and towing a boat under those circumstances is exactly the same, isn't it?

A. Yes.

Q. You have known that to be done often?

A. I have known that to be done.

Q. Towing a boat without steam?

A. Yes.

Q. Do you call it negligent?

A. No.

Q. Do you call it negligent to tow a boat without steam down or up the Weser River?

A. Well, I don't know—yes, I would if you could have her repaired, you are running a great risk.

Q. Whether you can or cannot have her repaired is hardly the question, is it, or the reason as to whether or not it would be careless to tow a vessel up or down the Weser with no steam on her?

A. I would consider it wrong.

Q. Negligent?

A. Yes.

Q. Then you never could tow a ship up to Bremen to have engines put in her, could you?

A. Yes.

Q. How could you?

A. What do you mean by how could I?

Q. That is you could not safely tow a ship up the Weser to have engines put in her?

A. Always run a risk.

Q. Do you think the risk is such that a man who attempts it is negligent?

A. No, I don't think he is negligent.

Q. Then towing up and down the Weser River, if you [fol. 382] have a ship that has no engines in her, it isn't negligent to tow her with her rudder amidships?

A. Not if you have to tow her, no.

Q. You would expect a classification surveyor to give a certificate of seaworthiness for a vessel to be towed under those circumstances, wouldn't you?

A. Yes.

Q. Haven't you known many certificates granted to tow a vessel without a rudder?

A. Yes.

Q. Haven't you known many certificates given to tow a vessel with her rudder lashed?

A. I have known some, I won't say many.

Q. Do you think that a surveyor who granted such a certificate was incompetent?

A. I didn't understand a certificate was granted.

Q. In the cases that you have known about?

A. I beg your pardon?

Q. Where certificates have been granted to tow a vessel with the rudder lashed, have you thought that the surveyor was incompetent?

A. No.

Q. Haven't you agreed with him that it was a safe thing to do?

A. I would agree.

Q. Why wasn't it safe to tow the "Isis"?

A. I said it was not as safe as under her own steam.

Q. I will try to make it clear to you that we are not struggling with infinitesimal divisions of safe, more safe, properly safe, seemingly safe plus 5 per cent, I want to know do you mean to testify that in your judgment the group of men who inspected this ship and decided to tow her were negligent in reaching that conclusion?

A. Under the circumstances, I do.

Q. Just why would it be prudent to tow other ships with rudders lashed and imprudent to tow the "Isis"?

A. That depends—in this case you had a very big value in cargo which you were risking.

[fol. 383] Q. I think you can confine yourself to the physical condition of the ship, if empty or full I don't think that makes any difference.

Mr. Longley: I think the captain's answer is very important, I am afraid I must suggest that——

Q. Answering my question assume that I am interested only in the likelihood of disaster. You have no more right to destroy a ship that is empty than one that is full. It becomes a pure question of proper navigation, I want your opinion on that. Why would it be imprudent to tow the "Isis" when, as you have admitted, it is quite prudent to tow a vessel without steam or a vessel with a rudder lashed on the same river?

A. I have given you one reason.

Q. Have you any other reason?

A. I don't consider, as I have told you, I don't consider she was as safe as if she had been under her own——

Q. What I want you to tell me is do you consider that all of the people who decided that it was appropriate—underwriters, owners and surveyors who decided that it was—were negligent?

A. They were—the only surveyors there was the owner's superintendent—no underwriters, according to the evidence.

Q. Well, the underwriters agreed to the towage and the owners agreed to the towage, all the surveyors recommended towage, do you think that all of them were negligent?

A. I do—in preference to putting her under her own power, that is the way I would like to qualify it.

Mr. Longley. I don't think the witness is bound to express an opinion as to that.

[fol. 384] Q. Then you are not merely saying it would be safer to go under her own steam, you are now saying it was negligence to go in tow?

Mr. Longley: Is the witness to assume, and are we all to assume you are referring to an absolutely straight rudder?

Q. Absolutely straight rudder throughout?
A. In the condition she was, no.

By the Commissioner:

Q. What are you assuming that condition to be?
A. That the ship was where she could be repaired and should have been repaired, or else the ship taken out of the water, that they could have seen the rudder—assuming those things, but it is only an assumption.
Q. I understood your answer to the question to be qualified by the condition in which the "Isis" was at that time. Now what I want to get clear on the record is what condition exactly you are assuming about the "Isis" at that time?
A. That there was something the matter with her rudder—we know it was twisted in the stock, we don't know how the rest was.

By Mr. Haight:

Q. If you will assume that the rudder was straight, the stock was twisted and nothing else was wrong, do you still say it was negligence to try to tow her down the river with three tugs?
A. I do.
Q. You do?
A. In my opinion.
Q. That is all we are talking about, is your opinion. In [fol. 385] view of the time you have spent here in New York, you don't know that United States transports, very much bigger ships than these, are towed continuously from the transport base to the Navy Yard without steam?
A. I know nothing about transports.
Q. Would you think that negligent?
A. I don't know.

Q. With reference to proceeding at night, you say that you can't detect the current going past the buoys at night. If you were a pilot and had gone up and down any river all your life, you would know current conditions, wouldn't you?

A. You would be supposed to, but they vary.

Q. If you had a pilot who knew his business, he would not have to be told what the currents were, he would know?

A. He should know.

Q. If he knew his business he would know?

A. He would know.

Q. So that wouldn't make it dangerous to proceed at night, if you had a pilot?

A. I don't know in that case.

Q. You said that in ordinary prudence, the right thing to do was to sail by daylight. I have understood you to admit that every ship goes at night about as much as she goes in the day?

A. Yes, we are compelled to.

Q. Do you think it is careless every time it gets dark?

A. I think it is always a certain risk.

Q. You think the night boat between New York and Providence ought not to go if people want to be careful?

A. That is not the same as this.

Q. It is going through narrow channels and over fast currents, you don't think it is negligent to run the night boats to Albany or Providence or Fall River or Newport?

A. No, no.

[fol. 386] Q. Why not?

A. Mr. Haight, there is no comparison.

Q. If ordinary prudence requires you to navigate by daylight, how can you be ordinarily prudent and run these boats by night?

A. I don't know.

Q. The answer is that your first answer was wrong, isn't it?

A. No.

Q. It isn't negligent to navigate by night if you have a boat that is fit to navigate?

A. It is a greater risk.

Q. It isn't negligent, is it?

A. I don't know how far you extend negligence.

Q. I am not interested in what is the most safe thing, I am only interested in what a prudent man would consider proper. You don't help us, any of us, by saying it is a little safer this way or that. What you have to say is that it is negligent or not negligent under the circumstances to do what the "Isis" did?

A. It was negligent to do as they did with her.

Q. But it isn't negligent to run the Fall River boats?

A. I have nothing to say about the Fall River boats, Mr. Haight.

Q. But you are on the witness stand as an expert. I am entitled to ask you by the same rules you apply to the "Isis", is it negligent to run the Fall River boats at night?

A. Not in clear weather, I don't.

Q. But it would always be negliegnt in foggy weather?

A. Certainly.

Q. The "Isis", you understand, had clear weather and moon shining?

A. Yes.

Q. Now about the bend in the rudder of the "Isis", you say that in your opinion her rudder could not have been bent down at the bottom while she was steering, just before [fol. 387] she stranded the second time?

A. Not as the evidence is given there.

Q. Because there was nothing to hit, is the way you put it?

A. No.

Q. The captain of the ship on the bridge says that twice he felt his stern strike bottom. Do you as an expert want to go on record by saying that he in your judgment perjured himself?

A. I won't say he perjured himself, but there are other reasons.

Q. Well, he either did or did not hit and he either did or did not lie about it. Are you willing to say that a man who says on the bridge twice I felt the jar of striking aft—are you willing to say that it wasn't so?

A. I am willing to say he did not know the difference between her striking aft and the tugs bumping alongside of him, because he said it was so slight a blow.

Q. You are assuming that the tugs were not made fast alongside?

A. A tug will always bump.

Q. Isn't the testimony that both of those tugs were made fast alongside tight?

A. The word fast as making a tug fast, she was made fast alongside, you haven't gotten the nautical phrase, excuse me.

Q. You don't think that a captain of long experience would know the difference between striking bottom and such movement as a tug would have, made fast alongside?

A. Not when it is as slight as he put it at.

Q. He hasn't said it was slight, as I remember, he said he felt the jar on the bridge, of his vessel striking twice on the bottom—you don't think he could possibly have told the difference?

A. No, I don't when he had tugs on.

Q. You say that the rudder could not have been bent [fol. 388] without damaging the shoe?

A. I say that if she went over something there.

Q. Where do you find the evidence that there was no scratch on the shoe?

A. There is no evidence of a scratch on the shoe.

Q. But where do you find evidence that there was no scratch?

A. It is there somewhere.

Q. When you go off the witness stand I will ask you to look at the Hamburg testimony and see if you can find it, I don't remember such testimony.

Mr. Longley: Do you prefer to have him look, or shall I?

Mr. Haight: You may look too.

Q. Have you ever known a rudder to be bent where the shoe was undamaged?

A. I have.

Q. How did that happen?

A. That happened by striking high land where the water was deep right close in. I had a case myself a year ago where a rudder was bent out in the River Plate and the shoe was not damaged.

Q. Would you think it impossible for a vessel in the River Weser to bend her rudder without affecting the stock?

A. The stock?

Q. Yes, the rudder stock?

A. Well now, I don't just quite follow you.

Q. I understand you to say that if the "Isis" had hit hard enough to bend the rudder, she must have hit hard enough to start something?

A. Yes.

Q. Up in the steering engine?

A. Yes—start something where the rudder was lashed.

Q. The lashing was at the quadrant?

A. Yes.

Q. And there could be no impact which would bend the bottom of the rudder which would not also start something at the lashings?

A. It would strain and start something at the lashings.

[fol. 389] Q. Or at the quadrant?

A. Or at the quadrant.

Q. Now I repeat the question. Have you never heard of a case where the rudder has been bent without the quadrant being damaged or the stock twisted?

A. I don't know that I have, but it is possible.

Q. The weakest point is the one that always gives under a strain, isn't it?

A. In this case it don't look like it—the first damage, I mean.

Q. Haven't you often seen vessels with twisted rudder stocks?

A. Yes.

Q. That happens very frequently, doesn't it?

A. Yes.

Q. Isn't it also true that that happens frequently without the rudder being bent at all?

A. I believe it does, I don't know that I know of any but I believe it does.

Q. A rudder stock is frequently twisted by a heavy sea, isn't it?

A. Yes.

Q. The rudder blade isn't bent, is it?

A. I can't tell you that, I have never had an experience.

Q. Have you as a surveyor had any particular case in which you have had a twisted stock?

A. Yes, I have but I can't remember, so I wouldn't be speaking fairly if I gave you an opinion on the blade.

Q. How long have you been in New York as a surveyor?

A. Nearly 14 years.

Q. How many cases of bent rudders have you had in that time?

A. I remember only two or three.

Q. How long ago was that?

A. The last one two years ago in the "River Plate".

Q. If in all those years you have only had two or three cases, do you think you are qualified to state as positively as you have stated all these things about the "Isis'" rudder?

A. I do.

[fol. 390] Q. Well, you will admit, as I understand it, that you can twist the rudder stock without bending the rudder?

A. I believe you can.

Q. A big wave might do it?

A. Yes.

Q. If you back up against a bank or wharf or anything else, that might do it?

A. I wouldn't think so without damaging the blade, if you back your blade against a wharf.

Q. Suppose you had your rudder hard over and your ship backed up against a pier so the pressure came upon the full width of the blade, that would twist the stock, wouldn't it?

A. Probably would.

Q. A big wave hitting a rudder sideways would not infrequently twist the stock?

A. It does.

Q. Have you ever known of damage of that kind where a rudder blade has been bent?

A. I can't specify a case that I do know.

Q. Now you said that if the rudder were straight originally and the vessel had hit on the starboard side of the river going down, the blade would have been bent to port, if at all?

A. If hit on the starboard side, it would bend to port.

Q. The testimony of the captain of the "Isis" is that when he came down his bow projected out and caught the upcurrent going into the "Lesum", his bow was then swung to starboard and his stern was swung to port?

A. Yes, sir.

Q. At that time he had been swung over onto the starboard side of the channel so that his starboard tug had had to let go and he had been forced to cut off his starboard engine for fear of picking up the chain of the boat. It was while the boat was making that swing, according to the captain, that he hit bottom twice. If while his stern was swinging to port he had hit bottom and had bent his rudder, the

rudder would have had to be bent to starboard, wouldn't [fol. 391] it—in the opposite direction?

A. You mean if he hit it on the outside?

Q. Yes.

A. If he hit it on the outside, yes.

Q. If he hits it on the bottom of the river while his stern is swinging to port, it will bend in the opposite direction if at all?

A. If it was on the bottom of the river, it might.

Q. And you agree that if the bow was swinging to starboard the stern had to swing to port?

A. The stern had to swing to port.

Q. You stated unqualifiedly that any force which could twist a rudder stock 45 degrees must have bent the blade?

A. I would think so.

Q. But haven't you known of cases where the sea has twisted the stock 45 degrees and still hasn't bent the blade?

Mr. Longley: I object to the question because of the fact that the witness did not say any such thing. He said in hitting a bank, not a general statement.

The Commissioner: Do you object to the question on that ground?

Mr. Longley: I do.

The Commissioner: Overruled.

Q. (Repeated.) But haven't you known of cases where the sea has twisted the stock 45 degrees and still hasn't bent the blade?

A. No, I don't know that I know of any case where it has been 45 degrees.

Q. Would you think it impossible?

A. I wouldn't think it impossible.

Q. You would not?

A. Nothing is impossible.

Q. Do you think it unlikely?

A. Yes, I would think it unlikely.

Q. The testimony is that the "Isis" with her rudder hard [fol. 392] to port was swung across the river until her stern came in contact with the mud bank. Now if you assume that the blade of the rudder was driven into this mud bank and the rudder stock was then twisted by pressure of the bank against the blade of the rudder, there wouldn't be any tendency to bend that rudder, would there?

A. There might be at the bottom.

Q. But not at the top?

A. Because it is mud on top, you don't know what it is below in those cases.

Q. The chances are that pressure applied by a mud bank would be like pressure applied by a wave——

A. It could be.

Q. To twist the stock and not bend the blade, isn't that so?

A. It might be.

Q. Now you stated definitely that in your judgment it was not prudent for the Hamburg Line to allow this ship to go down the Weser as she went. If the classification surveyor said that he considered the vessel fit and was ready to give a certificate of seaworthiness and if the underwriters on the ship knowing the facts approved, and if the underwriters on the cargo, so far as they could be reached, also approved, just wherein lay the negligence of the Hamburg Line?

A. Why, the surveyor did not give any certificate.

Q. If the surveyor said that he would give a certificate.

A. Well, he didn't see the ship.

Q. If, being told the facts, the surveyor said "I will give a certificate," and if the hull underwriters 100 per cent, and all the cargo underwriters available approved, I want to know wherein you think the Hamburg Line was negligent?

A. In not having a certificate, for one thing. It was their own employee that made the survey.

[fol. 393] Q. Plus two or three dockmen and their surveyors. If the surveyor had given his certificate and the underwriters on the hull had approved and part of the cargo, would you then have thought it negligent for the owner to let the ship go?

A. If——

Q. If?

A. Am I supposed to answer a question on an "if"?

Q. These are all hypothetical questions, you are an expert.

A. I have my doubts if he would give a certificate.

Q. If he had given a certificate, you wouldn't call it negligent, would you?

A. No, you couldn't call it negligent if he had given a certificate.

Q. Then in this instance the negligence of the Hamburg Line all turns upon the question that the classification sur-

veyor said he would give a certificate but hadn't actually signed it because it was after 7 o'clock and he wanted to wait until morning for his convenience?

A. Not that.

Q. That is the fact, isn't it?

A. No.

Q. You read the testimony of the man who said it was 7 o'clock and who said that he would give a certificate in the morning?

A. We have no certainty that he would have given a certificate in the morning.

Q. What you have is the certainty that he said he would give a certificate in the morning?

A. That is true.

Q. If he had given a certificate, it would not be negligent. I want to know if your whole testimony hangs upon the fact that he had said he would give a certificate but hadn't done so?

A. He intended to do so?

Q. He said at 7 o'clock at night "I will send it in the morning."

A. I am still of the same opinion.

[fol. 394] Q. If, for instance, Lloyd's surveyor had given a certificate of seaworthiness, then it would be all right for a man to go?

A. If he had seen the ship.

Q. Suppose he had said I don't need to see the ship, if all that has happened is that she has a twisted rudder stock, I will give you a certificate anyhow, what would you do?

A. I suppose if I were in the master's place I would accept it.

Q. You wouldn't thing it was negligent, would you?

A. Yes, I would think he was very negligent.

Q. If you were the master in those circumstances, would you refuse to go?

A. I don't say I would.

Q. Would you be negligent if you went?

A. Not if he gave me a certificate.

Q. I have understood you to say that you would prefer to have no rudder at all rather than a lashed rudder?

A. Yes, that is so.

Q. Do you mean to say that it is always negligent to tow a ship without removing the rudder?

A. No.

Q. Certainly not—many ships can be towed with rudders lashed?

A. Yes.

Q. So that the failure to remove the rudder isn't negligence?

A. Not in all cases.

Q. You have testified that in your judgment if the water were pumped out of a dock so that only the remaining 3 feet or perhaps 4 feet of rudder was covered, that it would be impossible to tell whether the whole of the blade was straight?

A. With a slight bend, yes.

Q. How much of a bend do you think you could detect?

A. You couldn't detect a 5 degree bend.

Q. Do you think a 5 degree bend would make any differ- [fol. 395] ence in steering of the boat?

A. I think it would, yes.

Q. Even just down at the very tip end a 5 degree bend would make a difference?

A. Some.

Q. Would it make a serious difference?

A. It would always help her to go.

Q. Do you think a difference of 5 degrees was such that it would be negligence to start with such a bend whereas it would be perfect prudence to go with a straight rudder?

A. I do.

Q. Have you ever known vessels to be docked and to find as big a bend as that that nobody ever heard of or knew about?

A. Yes, I think so.

Q. Possibly they had run for months with a bend of 5 degrees and nobody knew it was there?

A. I don't know they had run for months.

Q. Have you known of cases where they have run a considerable period and nobody knew?

A. I know of cases where a ship went to drydock and they found a bent rudder they hadn't know about.

Q. If it wasn't more than 5 degrees, would not that be quite easy—quite a normal thing, and you would not notice it?

A. No, you might notice your ship was behaving badly.

Q. Then you would know there was something wrong with the rudder?

A. Yes.

Q. You ought to know?

A. Yes.

Q. How big a bend have you found in a rudder which was never known to exist until the boat was docked?

A. I can't give you the dimensions, I have just happened to see that, I wasn't connected with it.

Q. More than 5 degrees at the tip end?

A. May have been, I can't say.

Q. You as a surveyor, if you had a rudder 16 feet long and all of it out of water except the last 3 or possibly 4 feet, [fol. 396] if the top 12 or 13 feet was absolutely straight, if a man taking his coat off goes down under water as far as he can reach and finds no bend, if taking straight sticks he goes down and finds no bend, would you think it careless for that man to say this rudder blade is straight?

A. Yes, if she had been where this ship was.

Q. Now if in addition to feeling down as far as his arm would go and feeling down with a straight stick, you had sent a diver down who examined the rudder and reported that it was straight, would you still call it negligence?

A. I don't know, I am afraid I would be inclined to listen to the diver, that is what you engage him for.

Q. You wouldn't think it negligent to trust your diver?

A. It depends who he was.

Q. If you had a proper diver, you would listen to him?

A. Yes.

Q. Now you have testified about what you thought would be the effect of trying to navigate the "Isis" with a bent rudder, that if you were going to change your course to starboard a bent rudder would cause her to sheer?

A. Quicker.

Q. And if you wanted to swing her to port, the danger would be greatest?

A. She would be slower.

Q. Now if there was anything wrong with the rudder of the "Isis", this same bend would have been there all the way down the river, wouldn't it?

A. When she started from Bremen?

Q. Yes.

A. Oh, yes.

Q. You are assuming, I take it, that she had a bent rudder when she started?

A. I am.

Q. There is no proof of that in the record, all the proof [fol. 397] we have is to the contrary, but you still assume that her rudder was bent?

A. I do.

Q. Now if the bend in the rudder was there and was sufficient to affect her steering, it would have shown as soon as the ship started, wouldn't it?

A. It would if they were not steering with the tugs at all, if the tugs were assisting against that rudder.

Q. The testimony is that the two tugs alongside and the tug ahead were all of them towing full speed ahead, you remember that?

A. Yes.

Q. And that the engines of the "Isis" were being used to steer the ship?

A. At times, yes.

Q. Did you see the maneuver book?

A. I saw the maneuver book, but——

Q. Did you try to analyze it?

A. No, I did not.

Q. You will find in the maneuver book that while the vessel was making a swing to port, a period of 14 or 15 minutes, that the port engine was idle and the starboard engine was going slow ahead, stop, slow ahead, stop, slow ahead, stop—that would be normal procedure, wouldn't it, if the boat were swinging gradually to port?

A. It would.

Q. If you had a rudder so badly bent as to cause this vessel to go clear across the river and run her nose into the far bank, you would expect a defect of that kind to show itself when the boat was going down the river for some 15 kilometers before, wouldn't you?

A. You would expect her to sheer.

Q. If as a matter of fact the uncontradicted testimony is that the "Isis" was navigated down the river with perfect ease and that she never had any trouble of any kind until just as she got down here to the "Lesum" and caught [fol. 398] that cross current, wouldn't you think that there was something wrong in your theory that her rudder was so bad that she was unfit to go?

Mr. Longley: I object to the question as obviously not supported by the evidence, the evidence is that the ship had difficulty getting back into port some 9/10 of a mile before she got to the "Lesum".

The Commissioner: Overruled. It doesn't do any harm, if the evidence is not as indicated by Mr. Haight.

A. No, I don't think yet that my theory that the rudder was improper for her to go is wrong.

Q. If a ship steers perfectly for 17 kilometers, why does she suddenly balk?

A. It might be the handling of those tugs.

Q. Yes, sure. Now we are getting to it. I will ask you to assume that the facts stated in the evidence are correct, that the upcoming vessel was encountered just as the "Isis" came down toward the juncture with the "Lesum", that when the pilot turned his vessel to starboard to pass this ship down parallel close to the "Lesum", he catches this current on his port bow and the "Isis" is carried over to the starboard bank and the starboard tug is forced to cast loose. The pilot has run the boat down right onto the starboard hand buoy and for fear of tangling up his starboard propeller, he stops his starboard engine, the bow of the "Isis" comes out into the current of the "Lesum" with the starboard engine stopped, the starboard tug gone and nothing but one tug ahead to hold her. That would account [fol. 399] for the ship's going ashore, wouldn't it?

A. Evidently, it looks like it.

Q. Do you need any more explanation of the stranding than that?

A. Well, he had a tug on the other side.

Q. Yes, but a tug made fast on No. 4 hatch on the port side can't very well make up for the starboard tug and the starboard engine, can it?

A. No.

Q. All he can do is to reverse?

A. Well yes, he can reverse his engines.

Q. Now, as a practical man with long experience, won't you admit that the navigation of the "Isis" was about as bad as it could have been going down into the current of the "Lesum"?

A. Well, it has ended up so, but according to your own statement on the case, you say she went along for about 14 kilometers splendidly.

Q. But suppose you had had no tugs and had your own engines and your own rudder, would you have undertaken to go out into the current of the "Lesum" with your starboard engine stopped, and try to make your swing that way?

A. I would not.

Mr. Longley: I assume this is all subject to my objection.

The Commissioner: Yes.

Q. No man would?

A. It has been done, so there must be——

Q. No careful man would?

A. I wouldn't do it.

Q. It would be careless to do it?

A. It would.

Q. Don't you consider that the navigation of the "Isis" just before this second stranding was negligent?

A. I can't see that it was negligent.

[fol. 400] Q. Wouldn't it be prudent under such circumstances to stay up the river with your tugs to hold you in position, let the upbound ship go by and then make your turn around the bend with nothing in your way?

A. It would be better.

Q. That would be common ordinary prudence, wouldn't it?

A. Yes.

Q. Wouldn't you say it was negligence not to wait?

A. Now that is pilotage rules, I don't know anything of the pilotage rules.

Q. Don't you think that a prudent navigator would in a river like that wait till the vessel had gone by, then make his sharp turn in the channel with nothing in his way?

A. Didn't he have over a mile from that point?

Q. No, he is so close to that buoy that he has to stop the starboard engine for fear of catching the buoy?

A. But from the point where he makes his port turn?

Q. The port turn is right at the junction with the "Lesum"?

A. Just below?

Q. Just below.

A. I thought he was about a mile off.

Q. Well, prudent navigation would mean that you stay in the river until the time comes for the other boat to go by then go on with the whole channel at your disposal?

A. That would be prudent.

Q. With three tugs, it was easy to do that?

A. Yes, two tugs would help him do it.

Q. With three it would be easy enough?

A. Yes.

Q. You have testified that a vessel with her own rudder is better off than a vessel with tugs. I omitted to ask you one question. You said that a tug ahead couldn't help very [fol. 401] much because in a narrow channel she couldn't swing far to one side or the other?

A. Yes.

Q. That wouldn't be true going around a bend, the tug ahead would be tremendously helpful?

A. After she got around the bend she is ahead?

Q. If she is ahead she would go around before you did?

A. Yes.

Q. So that in making turns, the tug ahead is the most useful thing you can have, isn't it?

A. In helping you around the turn.

By the Commissioner:

Q. Captain McLennan, I understood you to say that you thought 5 feet by the stern or about 5 feet by the stern was too much?

A. It is too much.

Q. With this vessel what do you think was the proper trim for going down or coming up the river?

A. She would be better about 1 foot by the stern.

Q. Are you able to say under which of the following conditions she would handle better: (1) A foot by the stern and without tugs, with her own power and her steering gear in proper shape; or (2) 5 feet by the stern and the steering gear out of commission but with her own power and three tugs?

A. The first one—as she went up river?

Q. As she went up the river.

A. The second one is as she came down the river?

Q. Exactly.

A. I would consider she would do much better in the first case 1 foot by the stern, under her own power.

Q. Suppose she was only 2 inches by the stern?

A. Well, that is the difference in ships.

[fol. 402] Q. You wouldn't be able to estimate that?

A. You couldn't estimate that, ships vary.

Q. Do you know how big the rudders on these two tugs were?

A. No, sir, I know nothing about that.

Q. Do you know what the relation between the area of the tugs' rudders and the area of the steamer's rudder was?

A. No, sir.

Q. You don't know how wide the tugs were, do you?

A. You mean the beam or rudder.

Q. The beam of the tug?

A. No, I don't, but I suppose you can get both in Lloyd's.

Q. But I gather from the fact that you have given your opinion without this data that you don't think it makes any difference?

A. I don't think so. It makes a difference where she is moored to the ship what power she has to steer.

Q. We know she was moored abreast No. 4 hatch, and, by referring to Exhibit 6, it is a fair estimate, isn't it, that the screws of the tugs were approximately abreast of the screws of the steamer if the tugs were abreast No. 4 hatch?

A. They are not far out, I think the propeller and stern of the tug would be very near alike, by this.

Q. Did you take the exact position of the tugs into consideration in forming the opinions which you have given us?

A. Yes, sir.

Q. What position did you assume?

A. I assume the tugs would be put far enough aft to steer the ship, those men that are accustomed to tugboats know exactly where to put tugs to act as a rudder on a ship when towing, I am presuming these were competent tugboat men.

Q. Suppose you were taking a ship into one of the berths in Atlantic Basin here in New York for instance, and the [fol. 403] circumstances were such that you had your choice of taking the ship in there with an injured rudder or injured steering gear so that the rudder was useless, with three tugs, or of having her steering gear in perfectly good working order but without any tugs at all—I am assuming a vessel like the "Isis" say 375 feet long and 7,000 tons deadweight. If you were responsible for what was going to happen, which would you feel was safer?

A. In that case I would take the tugs.

Q. At the beginning of your testimony you were asked a question about the towage from Bremen to the sea and

then to the North Sea and up the river to Hamburg. Do you differentiate at all in the three stages of that journey, the two river stages and the open sea stage?

A. The two river stages are the most dangerous, the open sea is not so dangerous.

Q. In which stage would the presence or absence of the tugs play an important part, in your judgment?

A. When you get to the open sea, for that matter you could as a rule throw off the two stern tugs if necessary and steer with the engines because you have plenty of room from the mouth of one river to the other.

Q. But in a more or less congested river, you would want your tugs?

A. I would want my tugs.

Q. I think you said in answer to one of Mr. Haight's questions that you were assuming from the evidence that this vessel started down the river with her rudder not in a straight line with the keel—or not the whole of it in a straight line with the keel—just what did you estimate to be the condition of her rudder?

A. I assumed that it had this 5-degree bend all the time.

Q. The 5 degree bend starting where and running where? [fol. 404] A. That statement says from about halfway down the rudder.

Mr. Haight: No, says from the bottom up to perhaps the lowest arm.

The Witness: Halfway down.

Q. With a maximum departure from the plane of how much?

A. They say it is hardly noticeable at halfway, it increases, they don't say how far up, 5 degrees, in your evidence.

Q. I am asking you what you assumed to be the condition?

A. I just assume a bent rudder, that is all, I haven't gone into it.

Q. What I am trying to get at is, Captain, not what the fact was but what you assumed to be the fact in arriving at your conclusion. Do I understand that you simply assume that the blade of the rudder was bent.

A. Bent when she went ashore first.

Q. Bent to what extent?

A. I can only go by what they say, 5 degrees.

Q. How important do you think that was in the steering of the vessel?

A. It was that important that one of the Hamburg witnesses says—I don't know but two of them—that had they known it was as bad as that they wouldn't have let her go.

Q. I am trying to find out what your view is.

A. I am taking the view that they took, that it was that bad, I have to go by that evidence.

Q. Is that all you are going on. What we want to get from you is your own view?

A. That is my view, that she had a bent rudder and bent sufficiently enough to cause her to steer badly.

By Mr. Haight:

Q. You also think that a bend of 5 degrees would have [fol. 405] made her steer so badly as to make it unsafe to go?

A. I do in this case.

By the Commissioner:

Q. Do you think that was made worse by having a 5 foot drag?

A. No, I don't know that it was made any worse.

Q. There is no doubt in your mind that the upper part of the rudder was straight enough, is there?

A. That is what they all said.

Q. What would you say the effect of a 5 degree set in the rudder on the "Isis" would be as she was 5 feet by the stern, as compared with the effect on the same vessel on an even keel or with a very slight trim by the stern?

A. I don't know that it would make much difference, it would make some but I don't know how much.

Q. Do you think she would be more or less manageable with a greater drag?

A. Well, if anything I think she would be less, if anything—I think so but I can't prove it to you.

Q. I don't quite understand that.

A. She would be less manageable with this heavy drag.

ALFRED E. JORDAN, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Longley:

Q. Mr. Jordan, will you give your full name and address.

A. Alfred E. Jordan, 17 Battery Place, New York City.

Q. Will you give us a resume of your experience in con- [fol. 406] nection with maritime affairs.

A. I have served an apprenticeship for five years, I was sailing at sea eight years, five of which I was chief engineer, and two years assistant engineer of a drydock in the north of England.

Q. You spoke of serving an apprenticeship, what kind of apprenticeship?

A. In the building and repairing of marine engines, boilers, barges, winches, windlasses, cranes and other engineering equipment.

Q. And after your experience in the shipyard in England?

A. From 1905 to 1919 I was surveyor for the Salvage Association in America. From 1919 to the present time I have been in business for myself.

Q. During the course of your experience in maritime affairs have you surveyed many ships of all sizes?

A. A very great many.

Q. Some ships damaged?

A. Most of them damaged.

Q. Have you had occasion to consider ships that had damaged rudders?

A. A number of them.

Q. You have read all the testimony in this case, that was taken in Germany and also the testimony of the master and chief officer?

A. Not the chief officer.

Q. That is true, I haven't handed you that. You have read everything but the chief officer's testimony?

A. Yes.

Q. Mr. Jordan, are you in a position to express an opinion, if so will you do so, as to whether a vessel is more readily and safely navigated under her own power with the use of her rudder or with her rudder lashed and by the use of tugs?

A. Of my own knowledge, no, I am not in position to state what they would do under different circumstances, I may

[fol. 407] say that I have given instructions for damaged vessels to be dealt with in certain manners.

Q. If a ship is sailing with her rudder lashed amidships and with the use of tugs for steerage facilities, can you tell us whether or not it is safer for her to sail in the daytime or at night time?

A. I consider in any damaged vessel it is better to have daylight than darkness.

Q. Why so?

A. Because of the difference between daylight and darkness, it is relative.

Q. Does the fact of a bright moon change your opinion any?

A. Only relafively, if it is a very bright clear moonlight night and the people who are handling the ship know all their conditions, there wouldn't perhaps be much difference between the daylight and a beautiful bright moonlight night. But in common sense it is better to do things in daylight than at night, if you haven't got a perfect ship.

Q. Is that measure of common sense to which you refer particularly accentuated if a ship is sailing in narrow waters, or isn't that so?

A. I would only confine myself to a damaged ship. If a vessel were sailing undamaged they do sail as much nighttime as daytime, but where you have a damaged ship, greater care should be taken, I think.

Q. Is there any custom followed by your profession in relation to when a damaged ship shall sail, that is as to the measure of prudence, as to what that measure of prudence demands, whether she will sail in daytime or nighttime?

A. I don't know of any custom, it is left I think to the individual to determine what should be done, but personally I would say it is more prudent for a ship to sail in the day-
[fol. 408] time than in the nighttime, if she is damaged.

Q. Assuming the story told by the master as to the course, time and speed of the "Isis" after she sailed from Bremen are all true, what have you to say considering his opinion that the bend in the bottom of the rudder found after the second stranding resulted from the stern of the ship hitting something before the second stranding—having in mind all the evidence you have read here?

A. Well, unless the bottom of the river as the vessel was swinging to starboard was made specially for it to clear

the bottom of the stern frame and come up to the rudder, which is—the bottom of the rudder—about 2 feet above the stern frame, it is very difficult for me to understand how she could hit anything.

Q. If you hit anything to the starboard side of the ship, how would the rudder be bent?

A. If the ship hit on the starboard side, the rudder would be bent to port.

Q. Mr. Jordan, where is a bump on the bottom of the ship most noticeable, in the engineroom or on deck?

A. As a rule, it is very noticeable in the engineroom, your engineroom plates are onto the steel framework which is fastened to the ship, and a bump as a rule is very noticeable in the engineroom.

Q. Assuming, as has been testified here, that the rudder was lashed in the way they say it was lashed, and assuming that your quadrant was braked with either two screws as one witness has said, or one screw as the other witness has said, where would any such bump as would cause a bend in the boat's rudder show itself subsequently?

A. Where would the bump show itself?

Q. How would it be evidenced?

[fol. 409] A. If the rudder struck sufficiently to bend it, we would expect to have some action on the lashings or on the place where the rudder quadrant was fastened, I would not expect the lashings to remain tight after a blow of that sort, I would expect to see some evidence of it on the rudder and the quadrant where it was fastened.

Q. Mr. Jordan, can you conceive of a blow of sufficient severity to cause a twist in the rudder stock, such as has been testified to here of some 45 degrees, which would not also result in some bending or twisting of the blade when the ship has bent the rudder stock by going stern first onto a bank?

A. No. If the rudder strikes the bank or bottom of the river, I would expect to see the blade bent. If a solid sea struck I think it is possible, and I have so seen in my experience, that the blade itself was not buckled but the rudred stock was twisted.

Q. Have you ever known of a case where the stock has been twisted as a result of the rudder blade coming into contact with any solid substance that has not also resulted in a bending of the rudder blade?

A. No.

Q. Is it a comparable situation of having a wave hit the side of a rudder and of having the rudder hard aport and having the side of that rudder come up against a bank of mud?

A. No, I don't think it is at all comparable.

Q. Why not?

A. The wave hits the blade of the rudder a solid force. The ship hitting the bank, particularly in mud, presses the mud until it cannot press any longer, and that last pressure is what twists the stock. The solidity will be greater at the bottom by a very very great degree than it is where the water is.

Q. Mr. Jordan, having read the testimony here of what [fol. 410] was done, that this ship after having hit the bank, after coming off her first stranding sufficient to bend that rudder stock 45 degrees and then on navigating the boat to Bremen, tends to sheer to starboard, is examined by a diver before the ship is put into drydock, who reports that he can find no damage, and then is put in drydock but water is only pumped down to a point where the bottom 3 or 4 feet are covered with water, and the only examination made of the bottom part is by the men or one man who put his arm into the water feeling it around, or more men putting sticks down through the water, will you state whether or not that was prudent or imprudent for the owners to rely upon that examination alone to come to a determination of whether or not the rudder blade was in proper shape for the ship to sail?

A. I should say it was not prudent.

Q. Why not?

A. Because sufficient examination has not been made to find if the rudder was straight.

Q. What examination should have been made that would be practical to make?

A. With a loaded ship, the best thing would be take the rudder out.

Q. How would you go about that?

A. Put the vessel on drydock, because of this particular type of vessel.

Q. An ordinary vessel——

A. You would not need to put the vessel on drydock.

Q. Why the difference in this particular ship?

A. The vessel has a cruiser stern with the whole of her rudder under water. The lock pintle is below the water and cannot be gotten at without drydocking the vessel and lowering the water sufficiently to expose this lock pintle.

Q. Can you tell by examination of that plan which pintle [fol. 411] was the lock pintle?

A. No, it isn't shown. There isn't anything to show on this Exhibit No. 6 where the lock pintle in this rudder is located.

Q. Is there a customary place for one of those that will be the lock pintle?

A. The lock pintle is almost always put either on the top or second arm. The lock pintle is put there to hold the rudder from lifting, and it is very necessary that it be in such a place that it can be gotten at.

Q. Will you go on with your explanation.

A. And remove the rudder.

Q. How about taking out the stock, can that be done readily?

A. The rudder stock can be removed without drydocking the ship at all, if the lower part of the rudder is out.

Q. Is it a practical thing after having removed a rudder that had been bent, to have it straightened?

A. Yes, quite.

Q. Is that or is that not an operation that can be conducted in any ordinary shipyard?

A. Yes, it is.

Q. How about the stock, Mr. Jordan?

A. A stock that is twisted 45 degrees should unquestionably be renewed.

Q. I don't assume that you are familiar with the facilities at Bremen, or are you?

A. No, I don't know except that I know they build such ships as the "Bremen", that they have plenty of facilities that are known generally—personally I don't know.

Q. Is any ordinary shipyard or any ordinary forge, or is it not, a place where a rudder stock can be fabricated with ease?

A. A rudder stock can be built at any ordinary forge.

Q. How long would it take you in your experience to have—assuming a ship is put on drydock and pumped out [fol. 412] so that this top lock pintle is exposed—to take out the rudder stock, to take off the rudder, to have them

repaired and put them back again so that the ship could sail again in good condition?

A. About 7 to 8 days.

Q. Is there any necessity whatever of discharging any cargo under the circumstances?

A. No, sir.

By the Commissioner:

Q. I understand that you could take the rudder off simply by either tipping the vessel or drydocking her enough to get at that lock pintle?

A. Yes.

Q. Then it is just a question of power of lifting the rudder off?

A. Yes, rigging the blocks and that, if alongside a dock have a crane, use the crane on one side, blocks on the other to keep her level.

Q. Then you take your whole rudder to the shop and have it repaired?

A. Take the lower rudder to the shop, do any straightening that is necessary, have a forge make an upper stock, you can have a stock made in four days.

Q. Do I understand that you can replace the rudder without drydocking?

A. Not this vessel, you have to put it back in the same position in order to put your lock pintle in, you have to put her on the dock, pump the dock say halfway down, expose the position on the stern frame to fit your lock pintle back again.

Q. But it is only necessary to get her out of water that far?

A. That is all.

Q. In other words, you don't have to have her stern any further out of water to replace the rudder than to take it off?

A. No, sir, we frequently put rudders on afloat.

[fol. 413] By Mr. Longley:

Q. Would it be possible with this type of ship to tip your ship down by the bow by discharging cargo aft so it would not be necessary to put her in drydock at all?

A. Before answering that question I would like to have the drafts on her. From the look of this boat it seems to

me it would be quite difficult to tip her sufficiently to get the stern out of water, it may be quite possible but I would like to have these marks (referring to Exhibit 6).

Q. It is said that she had a draft of 23 feet 5 inches aft, 18 feet and a few odd inches forward?

A. It is necessary for me to find out at what draft the second arm of the rudder is out before I can answer that question intelligently—it would be quite possible to discharge sufficient cargo from aft and put it forward to bring her up to 14 feet.

By Mr. Haight:

Q. But if the second pintle is the one, you have only 11 or 12 feet or 10 feet?

A. Another thing you would have to have is the depth of water to get her bow down to do it.

By Mr. Longley:

Q. Sufficient depth of water?

A. Sufficient depth of water in the harbor to get the bow down to get the stern out—whatever you had by the stern, you would necessarily have to put a corresponding draft forward.

Q. If it may be assumed that there was sufficient water forward, the ship could be tipped by discharging cargo aft [fol. 414] so that this operation could be conducted without putting the ship in drydock at all?

A. Yes, it could be done.

By Mr. Haight:

Q. If the top pintle is the lock pintle?

A. Yes.

By Mr. Longley:

Q. Suppose the second pintle is the lock pintle?

A. I wouldn't risk getting a ship into a rather difficult position to bring her up to about 8 feet aft, she would be too deep forward.

Q. Is there any reason—you had some discussion with Mr. Haight, I didn't quite follow—is there any reason you can see in the record that would persuade you that the top pintle was the lock pintle?

Mr. Haight: This is pure speculation, I object to it.

The Commissioner: I think it is pretty remote, but I will let it go in.

A. The second gudgeon on the stern frame is tapered at the bottom, and it is necessary to have it square as the top one is in order to fit the lock pintle.

By Mr. Haight:

Q. How did you happen to find square ones at the bottom and only one tapered one, the second?

A. It is your plan.

Q. I know, but if a square gudgeon means one thing one [fol. 415] place, the same square one might mean the same thing somewhere else?

A. The only answer I can give is that I didn't make that drawing.

Q. You don't know what it means?

A. I don't know what it is there for, but I know they couldn't fit the lock pintle there.

By Mr. Longley:

Q. You mean they couldn't fit a lock pintle in the second one?

A. Where the second gudgeon is shown.

Q. How about the third and fourth gudgeons?

A. They wouldn't fit them there, too low down.

Mr. Haight: Objected to, too speculative.

Overruled.

Q. Could the plan show every lock pintle—leaving out the possibility of it being there—could it have been the third or fourth gudgeon?

A. Is it possible?

Q. As shown in the drawing?

A. Yes.

Q. It could be anyone of them?

A. Yes.

By Mr. Haight:

Q. Could you have more than one lock pintle?

A. Yes, you could but you don't.

By Mr. Longley:

Q. Under the conditions which I have described to you and which you have read in the testimony, what would you say, Mr. Jordan, as to what common prudence or due care [fol. 416] demanded in relation to this rudder when the ship arrived in Bremen?

A. The whole of the rudder should have been examined.

Q. How would you go about examining it?

A. Well, I have just said that, by taking it out or by exposing it wholly in the drydock. With a loaded ship, by taking it out.

Q. What have you to say as to the examination of the lower 3 feet of a rudder which is under water by feeling under water with a man's arms under water or by poking it with a stick or boat hook?

A. The feeling or examination of a diver would only disclose bad damage—the bottom of the rudder torn or curled up. A diver under water or a man feeling under water cannot feel a slight bend.

Q. Might there be a dangerous bend in a rudder blade under water which either examination by a diver or examination by the arms or a stick would not disclose?

A. Yes, there could be a considerable bend.

Q. What have you to say as to the lashings of this rudder with lines running to the bitts as shown in Exhibit 6, as to whether these would hold the rudder firmly or not?

A. I understand that the bitts are at the place marked A on Exhibit 6. In my opinion the lashing from the rudder blade to the bitts marked A is much too much in a vertical line to hold the rudder rigid.

Q. Mr. Jordan, I see that according to Lloyd's Register she is set out as having 717 nominal horsepower. What is the relation of nominal horsepower to indicated horsepower?

A. The relation is an arbitrary one. Nominal horsepower is builders' horsepower and indicated horsepower is the power made by assuming that a horse will lift 33,000 [fol. 417] pounds a foot in a minute. Nominal horsepower has really no relation to the indicated horsepower.

Q. Well, knowing the nominal horsepower, can one arrive at what indicated horsepower is?

A. No, it is different with different builders, it is between three and about four and a half times, the latitude is so great that there isn't any real meaning in nominal horsepower, it is exactly the same with automobiles, automobile horsepower is 25 on measurement and actual horsepower can be 100.

Cross-examination.

By Mr. Haight:

Q. Mr. Jordan, I understood you to say that if a vessel has any damage of any kind it is better to sail by day than it is by night. Do you mean to say that it is always negligent to sail by night if a vessel is at all damaged.

A. I don't think I said it was negligent at all, I said it was better to sail by day than night.

Q. I noticed that you said it that way. The only interest we have in this case is as to whether it was or was not negligent for the "Isis" to proceed. I want to know would you say it is always negligent for any ship that is damaged to start in tow at night?

A. In my opinion, yes.

Q. You are not a navigation man?

A. No, that is precaution, that is all.

Q. Haven't you known many ships to be towed at night that were disabled?

A. Not in my current knowledge, any time I have sent a ship out she has started out in the daytime, we have waited until morning to send her out.

Q. In this particular case, as you know from the testimony, the head pilot in Bremen was called up on the tele- [fol. 418] phone and told that the ship was going down river in tow, and asked what was the best time to start, and he said he would prefer to start that night. Do you think it was negligence on the part of the owners to comply with the head pilot's judgment?

A. I wouldn't say that there was negligence on the part of the owners for taking the pilot's recommendation as to when was the best time to start.

Q. And you wouldn't set your judgment up against that of the head pilot of Bremen as to navigation of the Weser?

A. No.

Q. It was his job to know, it isn't your job to know, is that correct?

A. Quite right.

Q. You have also testified that you can't understand how the stern of the "Isis" hit anything in the river. You have read the captain's testimony, he says he did hit twice. If the stern of the ship, where she drew the most water, did infact hit the bottom twice as it was swinging bow to starboard and stern to port, such a jar if considerable would be felt on the bridge, wouldn't it?

A. Yes.

Q. Isn't it true that a jar from hitting at the extreme stern would be felt more plainly on the bridge than perhaps it would in the engineroom?

A. No, no, in my experience the jar would be felt more in the engineroom than on the bridge.

Q. Even though at the extreme stern of the boat and hitting nothing but the rudder, approximately?

A. Yes, he said he felt her touch twice and that they didn't feel it in the engineroom.

Q. He said he felt it on the bridge?

A. Yes and that they didn't feel it in the engineroom.

Q. Did the Captain say that?

A. It is in the testimony somewhere, I don't know that the captain said it—that is the statement that is made.

[fol. 419] Q. Well, no witness has been called that was in the engineroom, as a matter of fact you have read all the testimony, you know that to be the case?

A. Quite.

Q. Isn't it true that if the boat touched bottom at the extreme stern it would be natural to feel it on the bridge?

A. Yes, if the boat touched hard enough to feel it it would be felt on the bridge or deck or anywhere on the ship.

Q. You don't undertake to say that the captain when he testified that he touched twice, has perjured himself?

A. I wouldn't say he has perjured himself.

Q. You know nothing about whether she did or did not touch there when you speculate, it is pure speculation, if the captain said he felt her touch, that is the truth unless he is a liar?

A. He may have been mistaken, I wouldn't say he was perjuring himself, but at the same time I wouldn't say he was correct in his assumption.

Q. But you have no knowledge at all on which you can base a statement that she did not touch?

A. No, only knowledge from what I have read in the evidence as to the way she swung past the buoy and then almost immediately afterwards was ashore with her stern in the channel of the Weser. It is unlikely.

Q. When the tug was crowded up against the bank, the starboard engine had to be stopped so as not to let her swing the buoy around to that bank——

A. No, but she was on the channel side of the buoy, she was afraid of picking up the buoy, afraid of picking up the chain of the starboard propeller.

Q. But she crowded the tug out absolutely?

A. Quite likely, but she was on the starboard side of the buoy.

[fol. 420] Q. But if she is carried right up the bank she can swing the buoy right along with her, can't she?

A. Yes, she might swing the buoy right along with her, but if she does she will have some marks of the buoy on her and get some damage from it.

Q. You didn't survey the outside of the "Isis" to find if she had scratches?

A. There is no testimony that she had.

Q. You don't know whether she had or hadn't?

A. No.

Q. You testified that if the rudder were lashed and if the quadrant were screwed down tight and the ship hit anything astern hard enough to bend the blade, you would expect it to show at the lashings and at quadrant—that is all a question as to which is the stronger part, isn't it—all a question of where the greatest strength is. If the lashings plus the brake are stronger than the rudder, the rudder will bend first, won't it?

A. You have the rudder striking something say on the bottom, with all that leverage she is going to loosen up these lashings.

Q. Did you understand that these lashings were specially made for the regular purpose of lashing this rudder in case of emergency?

A. I understand that these lashings were made fast for holding the rudder, lashed along the deck and set tight with tackles.

Q. Did you understand they were special wire ropes made for this precise purpose?

A. No, I shouldn't say they were, they take them from material on board the ship.

Q. Suppose it is true that they were special appliances furnished by the builders for this particular purpose, would that alter your idea a little bit?

[fol. 421] A. No, sir, they would still slack up if the blow wasn't sufficient to break them.

Q. Did you understand these lashings were hove taut with blocks?

A. Hove taut with blocks and then made fast around bitts, that is the way the evidence is given.

Q. If you get a proper brake on your quadrant you can set that down so tight that something will have to break before it will give, won't it?

A. Well, it depends a good deal on the brake, usually the brakes allow the rudder to slip slowly through them.

Q. The testimony here is, as I remember, that you could with the quadrant brake alone hold this rudder absolutely firm and secure. Now it is also testified in the case in the chief officer's testimony, which I think you said you hadn't read——

A. I haven't read the chief officer's testimony.

Q. That these lashings were specially provided for this precise purpose. Now if the lashings were perfectly taut and were so provided by the builders as to hold this rudder absolutely so and if the quadrant were tightly braked and the rudder then hit the bottom, if the lashings plus the quadrant and brake were sufficiently strong, you would bend your rudder before anything would give way above?

A. You would slack up your lashings just the same.

Q. No matter how strong they were, how big they were, no matter how tight they were nor how tight the quadrant held?

A. You can't lash around bitts that way, taken off blocks and fastened around your bitts.

Q. The quadrant brake alone set right in through, something would have to break or the rudder bend?

A. No, it would not—should not.

[fol. 422] Q. What kind of a brake are you assuming?

A. For instance a brake that goes up against the quadrant, a brake something after the style of a locomotive brake, as a rule it has serrations on [illegible] face of it, you set that up, hard up against your quadrant there are several different types.

Q. But there are some brakes which if set up cannot slip?

A. They will hold the rudder for anything except in a heavy blow.

Q. Aren't there some brakes which will hold the rudder until they break themselves or the rudder bends?

A. Well, you would have to screw those things up to such an extent that you would crush the wood in them.

Q. Don't some of them actually represent bolts that set right straight through?

A. None—I never say a brake that went right through the rudder, brakes are there to hold the rudder just the same as the brakes on anything else, a car, locomotive and so on. There are two types of brakes, usually one goes on the quadrant itself with a spring, the other goes against the face of the quadrant. I would expect something to show.

Q. But it is also a question of where the greater strength is, in the rudder blade or in the lashings plus the brake?

A. Yes, a question of where the greatest strength is and the force of the blow.

Q. I understood you to say that any blow which would produce a twist in the rudder stock would bend the rudder except that when a wave strikes the rudder blade that does twist the stock without bending the blade?

A. I have seen that myself.

Q. That happens quite often, doesn't it?

A. No, I don't think so, I have seen a number of rudder [fol. 423] blades bent by the sea hitting them and the stock not twisted, but I have seen the stock twisted badly and the blade not bent.

Q. Now when a wave hits a full face of the rudder or most of the face of the rudder and twists the stock, it is because you have applied your power over a wide surface of the rudder that the stock is twisted and the rudder isn't bent, isn't that so?

A. The total area.

Q. The total area on which the pressure is applied makes the difference between whether you bend the rudder or twist the stock?

A. And there is probably some question as to the angle at which she takes the blow. As I say I have seen the blade bent and not the stock twisted, and I have seen the opposite.

Q. Now if the "Isis" swings to port across the river with her rudder hard aport and sets that rudder for a very large part of the surface into the mud bank and then continues to swing, is there any difference between the application of the force against that rudder blade by the mud bank from the application of the force of the wave?

A. A great deal.

Q. What is that difference?

A. The weight of the rudder will be mostly on the bottom, there will be very little at the time she first touches the bank.

Q. Let us suppose that the bank is fairly steep and that the whole of the rudder blade is driven into the bank first before the stern of the ship itself hits into the bank?

A. All your ground around is water with loose mud, and it will stay mud.

Q. I am assuming a fairly solid mud or clay bank on the side of the river.

A. At your water level that will remain mud and lower [fol. 424] down you will get a very much heavier section of earth as your ship swings into it.

Q. If your ship is drawing 23 feet and the rudder is only about 18 feet up from the bottom—17 feet—then if the mud bank is 15 or 16 feet up from the bottom——

A. Straight?

Q. No.

A. A mud bank sticking up straight like that?

Q. No, but the mud is well under the surface. If you did shove a large part of the blade of your rudder into the mud bank before the stern of the ship itself hits the bank, why is there any particular difference between that and water?

A. I couldn't conceive an arrangement like that, you would have to have a vertical mud bank practically, you don't have that.

Q. You don't think shoving your rudder into a mud bank can be anything like the pressure of a wave hitting the rudder?

A. No, sir, not at all.

Q. Now you said that it wasn't prudent to examine the rudder and leave 3 or 4 feet under water. If you took two sticks 16 feet long and applied them one to each side of the face of the rudder and they were 12 feet out of water and 4 feet under water, do I understand that would give you any clue at all as to whether or not the face of the rudder was not——

A. You couldn't get them over, you have arms there, take it from arm to arm.

Q. Suppose, looking at Exhibit 6, you took a perfectly straight stick outside the arms?

A. It wouldn't tell you anything, the bottom of the rudder could be bent and wouldn't tell you anything.

Q. In other words, all the arms might be perfectly in [fol. 425] line, one perpendicular above the other and still the rudder badly bent?

A. No.

Q. No what?

A. You couldn't have it that way.

Q. In other words, if all your arms were perfectly perpendicular the rest of the blade would be perpendicular?

A. Yes.

Q. Then if I take a 16-foot stick and place it flush against a 16-foot rudder 12 feet under water, 4 feet aft, couldn't I get some idea if that rudder was straight?

A. Yes, if you took a straight edge and put a light at the back of it if it was dark and looked through the back, you have a straight edge all the way up and down, you might find that the rudder was bent.

Q. Why might?

A. It would have to be quite a lot.

Q. If I have 12 feet out of water and I know 12 feet are straight, or 13 feet and I know 13 feet are straight, and there were only 3 or 4 feet under water, can't I tell by putting a straight edge along that whether or not the remaining 3 or 4 feet suddenly twist out one side or the other?

A. I wouldn't be satisfied with doing that under water.

Q. I know, you are an expert from the other side, but wouldn't an ordinary man be satisfied?

A. I have done it many times and taken rudders out and examined them on dock.

Q. If this dock were engaged for another ship which was waiting for it, if that ship was going to keep the dock at least 14 days and if a diver had been down and reported the rudder as perfectly straight and if you had had it out of water 12 or 13 feet and found all of them perfectly straight, if you had examined under water with a very powerful electric searchlight and also with a stick

[fol. 426] A. Did you have the stick up and down for 12 or 15 feet there?

Q. They say they examined it with a stick.

A. No, they just felt down.

Q. I don't know how they applied the stick—you are assuming they didn't know how to use a stick. Let us assume all those facts, the diver, 12 or 13 feet above water, all this rudder fair that you can see, such an examination as you have made under water with a searchlight, all showing that the remainder of it is fair, the German Lloyd's man saying I will give her a certificate without seeing the ship, without seeing the rudder and being told what has been seen, all the hull underwriters and a considerable portion of the cargo underwriters saying we agree to tow, we don't want to keep the ship sitting in Bremen where she is going to be docked twice, we all agree—would you under the circumstances say the owner is negligent if he supplies one more tug than the underwriters want and starts down the Weser—answer yes or no.

A. I think he is negligent. I would like if I may to elaborate on this putting a stick up and down the rudder.

Q. Tell that to Mr. Longley, anything you like. Do you ever issue a certificate of seaworthiness?

A. Many of them—a great number of them.

Q. Have you ever issued a certificate of seaworthiness to tow a vessel where her rudder has not been in working order?

A. Yes, sir.

Q. Have you issued certificates for vessels that have had the rudder lashed amidships?

A. No, sir.

Q. Never?

A. Never.

Q. Have you issued such certificates where ships have had no rudder?

A. Yes, I have taken the rudder off.

[fol. 427] Q. Have you issued certificates for vessels that had no steam, while the rudder was amidships?

A. No, I don't think so.

Q. Do you think that Lloyd's would not give a certificate for a rudder lashed amidships or for a ship without steam, with the rudder amidships?

A. Certainly they would.

Q. Often do, don't they?

A. I would if circumstances were right and I had seen the ship.

Q. If the circumstances were that you had a twin screw boat and a rudder perfectly fair and three tugs, one made fast each side opposite No. 4 hatch and one ahead, with your twin screw developing 2,400 horsepower and your tugs more than double, wouldn't you give a temporary certificate of seaworthiness?

A. Yes.

Q. Just why would you deny such a certificate to the "Isis"?

A. Because I hadn't seen the rudder. I would want to see for myself, see that it is straight, you are assuming that it is straight, then I would give a certificate.

Q. If you had seen the rudder and it was straight you would give a certificate without doubt, wouldn't you?

A. Yes.

Q. If in fact the rudder of the "Isis" was straight, you would not have hesitated to give her a certificate, would you?

A. No.

Q. Then the whole of your testimony comes down to whether the rudder was or was not straight. If it was straight it was a perfectly fit thing to do to tow her down that river?

A. As far as I am concerned, for the vessel to go as you say, without any question of navigation.

Q. Whether her rudder was straight you don't know at all—in this instance you can't know anything about the "Isis", you can't pretend that you know the rudder was crooked?

[fol. 428] A. You asked whether I would give a certificate of seaworthiness I say I would if the rudder was straight and I saw it myself, I wouldn't give it on hearsay.

Q. That may be, but if as a matter of fact this rudder was straight, there was no negligence in undertaking to tow her down?

A. No.

Q. You don't know whether it was or wasn't straight?

A. I don't know.

Q. You have testified that to take the rudder off and do the repairs you have suggested would require docking the ship twice?

A. Exactly.

Q. And if you couldn't get a dock for two or three weeks, she would have to stay there until you could get a dock to dock her the second time?

A. Either stay there or go somewhere else, that is the question.

Q. But if you weren't going to tow her you would have to stay right there until a dock was available?

A. If you have to wait two years and there is no dock you have to wait, if you have to wait.

Redirect examination.

By Mr. Longley:

Q. Mr. Jordan, you wished to make some statement about that 12 foot stick, I will give you that opportunity.

A. Before you can find out whether a rudder is straight over the arms, it is necessary to measure each arm and see if they are all the same thickness, as a rule they are not.

By Mr. Haight:

Q. If you had four arms out of water, you wouldn't have much difficulty with those four—you would have nothing but the bottom to contend with?

A. These arms are tapered and they are different thick- [fol. 429] nesses, it is not a feasible thing to do.

By Mr. Longley:

Q. Are the circumstances which you have read here describing the first stranding such, or are they not such as would naturally lead or could naturally lead to such a bend as has been testified to here was found on the bottom of the rudder after the second stranding?

A. I would assume that such a blow as she got on the first stranding would be the kind of one that would give you the bend that was actually found in the rudder afterwards.

Q. You were asked by Mr. Haight about assuming the rudder was straight whether you would permit her to sail or not or consider it negligent to sail or not. In answering that question, did you have in mind as to when she should sail, day or night?

A. Well, I think I went into considerable length on the question of sailing day or night, before. In my opinion the proper thing to sail with a damaged ship is in the daytime.

By Mr. Haight:

Q. Would you give a certificate specifically requiring a ship to sail by day, even though the chief pilot ordered her to go by night?

A. If it were me—fortunately perhaps I have always been in position of being able to dictate. I have told them when they could go.

By the Commissioner:

Q. So you didn't have to put it in your certificate?

A. No, as a matter of fact in all these things I repre- [fol. 430] sented underwriters, we told them what they could do and when they could go. I think it is only fair to testify in Court as to what you have done and what you would do—that is what I would do.

By Mr. Haight:

Q. But you would also feel that when representing underwriters agreed to something, that the owner wasn't negligent if he acted upon your certificate?

A. No, most decidedly not.

Q. Now the Hamburg-American Line applies to the hull underwriters and tells them the facts honestly they believe and we still think so, and applies to the cargo underwriters and applies to the classification man and everybody says it is quite all right, tow your boat——

A. Without seeing it?

Q. Whatever they said, is it not true that the owner under the circumstances told that it was quite all right is free from any criticism if he acts upon such statements?

A. Well, I would rather really not answer that question. Personally I would never give a certificate of seaworthiness without seeing a vessel.

Q. You may criticise the other people that told the Hamburg-American Line to go ahead, but would you criticise the Hamburg-American Line for going ahead?

A. No, perhaps I wouldn't, if they wanted to take a chance and thought it was somebody else they were taking the chance on——

Q. No, it was the hull underwriters talking about their own money.

A. The hull underwriters never saw the ship.

[fol. 431] By the Commissioner:

Q. Mr. Jordan, I have just one or two questions. If I understood your evidence, many of these matters were questions of degree?

A. Yes.

Q. For example, I gather that when you say you would rather sail a damaged ship in the daytime than at night, you don't mean to suggest that you would rather sail at high noon in a thick fog rather than in the middle of a good clear night, and if it was a very dark night you wouldn't like it as well as bright moonlight and so on?

A. Relative.

Q. Also, there were many other considerations that would enter into it, appropriate time and tide, and depth over the bar if you had to cross a bar, time of arrival at port and so on?

A. Yes.

Q. Coming to the other matter of letting this vessel go under tow without having sighted the entire rudder, am I correct in understanding that the straightness of the rudder you have in mind is also a question of degree?

A. Yes, sir.

Q. You wouldn't hesitate to let a vessel go under such circumstances if there was a little flare in the rudder of a couple of inches on the very bottom?

A. As you say that is entirely a matter of degree, if there was anything there that was bad, we could cut it off. If the rudder was set a little bit one way you could counteract it by putting the rudder further over to port, if you know just what you have in front of you.

Q. Wouldn't it also depend on what assistance you had on hand, for example in the way of tugs—what I mean is this, if you have had one small weak tug, you wouldn't let a vessel go with quite as much the matter with her rudder as if you had as many tugs as you wanted and as much [fol. 432] power as you wanted?

A. Well, you wouldn't let it go at all. You must have the proper tugs to take her, even if her rudder was perfectly straight.

Q. Well, but the proper tugs would be different in number and degree, wouldn't they?

A. You might want six or eight tugs to take her out of a basin and turn her around. When she gets away and everything is all right, you may go along with two tugs—that is hardly a province of mine. You want sufficient tugs to handle her, when she is gone you are through with her.

Q. Well, would you regard sufficient tugs in the same way if the rudder was very slightly bent as you would if the rudder had quite a considerable set in it?

A. I would not consider tugs at all if the rudder was badly bent, wouldn't let it go at all, I would rather take the rudder off and let her go without one, I have done it myself a number of times, taken it away, she is far better without a rudder than with a bent one.

Q. The evidence here I think is that there was a 5 degree set in the rudder running from about the middle of it?

A. To the bottom?

Q. It is not wholly clear exactly where that set began and ended, but from the fact that no one discovered it on the first occasion, most of the bend was probably confined to the bottom 3, or at the most, 4 feet. Would you consider that a serious detriment in steering a vessel, assuming that the rudder were held fast and that you had three tugs in attendance?

A. If I made up my mind to let it go at all, I would put the rudder further aft than amidships to counteract that, I wouldn't let it all be on the starboard side.

Q. Suppose it were all on the starboard side, the entire 5 degrees?

A. I would rather have the rudder off altogether than let it go at all.

[fol. 433] Q. I understand that, what I want to get at is whether you would consider it imprudent to let it go, as-

suming that for good and sufficient reasons you didn't think it practical to take the rudder off?

A. If you knew the bend was there you could accommodate it by putting the rudder a little way over to port, you counteract the bend on the bottom by having the rudder away over to port.

Q. In your opinion is there any relation between the degree of the set in the rudder and the necessity for adjustment of power of the attending tugs?

A. Well, no, sir, I don't know that there is, I think that with the rudder perfectly straight as we must assume it was, that it is necessary for her to have sufficient tugs to handle her, she has only got tugs to steer her, she can't do any steering much herself, except by working her twin screw engines she has no rudder.

Q. Aren't the twin screw engines pretty effective for steering?

A. Not in very restricted waters, they fetch you around quickly.

Recross examination.

By Mr. Haight:

Q. Mr. Jordan, suppose the rudder were set in some way, the machinery blocked, something had happened so that you couldn't possibly have otherwise than the rudder amidships, and the bottom, the lowest 4 or 5 feet, sprung out 5 degrees, if you had three tugs of the power that these tugs were, made fast as they were, do you think that that slight set of 5 degrees which didn't start higher up than half way would make the boat unmanageable?

A. Well, in the first place I haven't handled ships myself, but what I would do if I were in their place would be to tell [fol. 434] the people on decks—the skipper, here you have a rudder that is bent, get the best part of your power aft, keep her always so that she doesn't sheer to starboard on you.

Q. That wouldn't be difficult to handle, would it?

A. Not if you knew it.

Q. If you had already navigated your ship for 17 kilometers?

A. I am not a navigator.

Q. I know, but if your boat had been navigated with tugs made fast as they were, the tugs going full speed, and the ship hadn't shown the slightest tendency to sheer either way, the twin screws had been going slow ahead, stop, slow ahead and stop and manipulated the boat perfectly, you wouldn't think there was any evidence of anything wrong with the rudder, would you?

A. Not if everything was perfect, how could I?

Q. If everything did run for 17 kilometers right, wouldn't that be the proof of the pudding?

A. You can't have anything better than perfect.

Q. Wouldn't you think if as a matter of fact the "Isis" with these three tugs went down to the Weser without the slightest tendency to sheer either way, was run by the propellers, went over to make these different bends, wouldn't you think that was the best proof you had that the rudder was lashed amidships and was fair?

A. It would seem so if she did that all the time and never had a port turn to go, I don't know anything about the Weser.

Q. At the very start she made a long swing to port, the maneuver book shows the port engine or starboard engine slow ahead and stop for about 15 minutes?

A. I don't know anything about navigation.

Q. If the ship navigated right for 17 kilometers, that [fol. 435] would be the best evidence you could have that the rudder was not out of true?

Mr. Longley: I would like to note on the record that I haven't qualified this witness as an expert on navigation.

A. I wouldn't like to say that at all. If everything in the boat was perfect, she couldn't want any more.

Q. I know you don't like to say it, but don't you feel honestly compelled to say it?

A. I don't think so, I don't know just how they were working that boat, I am not a navigator.

Q. I am telling you, and I am asking you to assume that for 17 kilometers the boat never sheered at all, if that is true won't you agree that that is the best evidence that the rudder was straight?

Mr. Longley: Objected to on the ground that I haven't attempted to qualify the witness as a navigator, therefore you are making the witness your own.

Objection overruled.

A. If it is true that the vessel never sheered at all, you couldn't ask any more from her.

Rosser Mathewson, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Longley:

Q. Your address?

A. 25 Broadway, New York.

Q. Tell us all about yourself.

[fol. 436] A. In business as a consulting engineer and ship surveyor. Served the usual apprenticeship, five years in marine engineering and spent two years in Liverpool University studying naval architecture and mechanical engineering; proceeded to sea for nine years, starting in as junior, at all times in charge of a watch, six years as chief engineer out of the nine. Stayed ashore in 1905, occupying a position as superintendent engineer, after general superintendent of various steamship lines out of New York. In 1910 opened my own office as ship surveyor and consulting engineer, during which time I supervised the operation, repairs and construction of steamers. In 1917 designed and built the Federal shipyard at Kearney, New Jersey, for the United States Steel Corporation. Stayed there as vice-president and general manager until the completion of our contract for 30 vessels, after which I returned to my office where I am now occupied.

Q. In the course of your experience have you had occasion to survey many damaged ships?

A. Yes, a great many.

Q. Of all tonnages?

A. All sizes and tonnages.

Q. Has that included survey of ships that have had their rudders damaged?

A. Some have, such ships were included.

Q. Have you read the testimony taken in Germany and also the testimony of the master and chief officer of the "Isis"?

A. I have.

Q. Mr. McGregor, I want you to assume a ship called the "Isis", 376.2 feet long, 51.8 feet beam, 25.9 depth, of approximately 7,000 tons deadweight, approximately 10,000 tons displacement, twin screw motorship with her motors in good condition, that her rudder blade is intact but by [fol. 437] reason of a bend in the rudder stock the rudder is put amidships and lashed as firmly as possible with wire rope, and the quadrant is made fast with clamps or screws. I want you to assume that she is at Bremen on the Weser River which is a narrow channel having changing currents and sharp bends, which it has been testified by those in position to know is difficult to navigate under the most favorable conditions. I want you to assume this vessel started from Bremen in tow of three tugs, one of 1,080 horsepower on a 30 to 35 foot hawser at the bow, one of 800 horsepower at the port and one of 810 horsepower at the starboard. Will you tell us whether a ship sailing under those conditions can be navigated with greater or less safety than if her rudder were intact and in use and she were sailing under her own power alone?

A. She can sail under less favorable conditions than if she had her own power.

Q. Why is that so?

A. Because with her own power she can communicate direct to the engine-room and get her orders obeyed quickly, having the rudder entirely under her own control, will answer it more readily. Added to which, if she had no control over her rudder and trusting only to towboats fastened on her port and starboard quarter, she has got no room to maneuver, especially when you consider, as I have read in the testimony, that the channel she was going through was only 300 feet wide. If you take the beam of the ship, 61 feet, take the beam of the two towboats added together, another 40 feet, you got 100 feet, which leaves about 50 feet on each side of the channel. I consider when you make an allowance for the current, that your space for maneuvring and steering with the towboats is very small.

[fol. 438] Q. I think my brother will take a little exception to your arithmetic, a 300 foot channel leaves 100 feet on each side, will it not?

A. Yes, 100 feet, that is right.

Q. Mr. McGregor, it is possible, under certain circumstances to steer a ship—a twin screw ship by maneuvring your engines, is it not?

A. Yes, it is possible.

Q. Is it safe to rely upon that alone in narrow waters?

A. Absolutely not.

Q. If you have a tugboat lashed on your port quarter and it becomes necessary in maneuvring your ship to go hard astern—full speed astern—on your port engine, would the towboat at the port add anything to the maneuvring ability of the ship?

A. In asking my opinion as an engineer, not as a navigator, I assume just knowledge of the action of vessels in flotation?

Q. Yes.

A. The action of the port propeller going full speed astern would tend to neutralize the action of the towboat also going full speed astern.

Q. Why?

A. Because the wash of the wake of the water from the propeller rushing forward, going from the stern to the forward end of the ship will counteract any effect that the port towboat would have—in fact the port towboat would have to run for her own safety.

Q. How about the advantage of the forward towboat, the towboat that has 30 or 35 meters of line from the bow, in narrow waters?

A. The big advantage is in towing the vessel in a straight line, its action for maneuvering is very little.

Q. In making sharp bends, I assume its help would be somewhat increased?

A. Oh, great help.

Q. Assuming this same ship sailing under the same con- [fol. 439] ditions I have already explained to you, what have you to say concerning the relative safety of sailing in daytime and at night?

A. It is always preferable to sail in the daytime.

Q. Why is that so?

A. Because you can see what you are doing better than at night time.

Q. If you have a ship which has her rudder lashed amidships and has three towboats which have been discussed

here, what in your opinion would ordinary prudence demand as to the time of sailing?

A. Certainly in daylight and also the time to catch the best state of the tide.

Q. Would that be particularly so in relation to narrow waters or not?

A. More particularly so for narrow waters.

Q. Assuming that the story by the master which you have read here is all true as to the course, the times he passed various places, the speed of the ship, etc., what have you to say concerning your opinion or statement or speculation that the bend in the bottom of the rudder found after the second stranding, resulted from the stern of the ship hitting a bank just before the second stranding?

A. I studied that question very fully, because it puzzled me, I came to the conclusion that the statement did not entirely convey it as to what actually did happen.

Q. Why do you say that?

A. Because I can't imagine the circumstances to be such that the rudder of itself could be bent and nothing else marked on the bottom of the ship, taking also into due account that the ship was on the starboard side near the bank and the rudder was bent to the starboard side.

Q. If the rudder hit anything sufficient to bend it as it is said this rudder was bent, what would be the result on [fol. 440] the lines or on the screws fixing the quadrant?

A. It would certainly carry away or very much stretch the lines, and it would show on the quadrant by the force of the blow on the rudder, it would cause a movement of the clamp or fastener.

Q. Are the circumstances which you have read here describing the first stranding such, or are they not such as might readily lead to such a bend as was eventually found in the bottom of this rudder?

A. They are exactly such as I would expect to cause such a bend.

Q. Having in mind that the rudder of this ship is some 2 feet above the bottom of the shoe, if the ship sailed over a shallow spot in the river, could the rudder be damaged without the stern frame being marked or damaged in any way?

A. I should say it could not.

Q. Can you conceive of a blow sufficient to cause a twist of the rudder stock from 40 to 45 degrees, the rudder stock having a diameter of 225 or 250 millimeters of steel, that twist resulting from the rudder hitting against a bank when the ship went aft with a sudden impact, which would not also give rise to some damage or bending of the rudder blade?

A. I cannot conceive of any circumstance in which the rudder blade would not be bent and show the effect of the blow.

Q. If you knew that the ship had hit with sufficient force against the bank so that you knew that your rudder stock was twisted in this way, what in your opinion would ordinary prudence demand in connection with the ship before she would be permitted to sail from a port like Bremen down the Weser River?

A. Obtain the fullest information possible about the extent of the damage.

[fol. 441] Q. How should that be done?

A. Either have the ship promptly put on drydock and examined by competent surveyors, if that were not possible, by removing the rudder.

Q. What would have to be done in connection with this ship to remove the rudder?

A. This ship is a cruiser stern, otherwise the rudder could be removed in wet dock. In the case of this vessel the water would have to be lowered below the second pintle—below the rudder arm, the coupling disconnected and the lock pintle removed, the rudder could then be lifted out quite freely.

Q. How about the rudder stock?

A. The rudder stock at the same time could be dropped.

Q. Is that comparatively simple and a customary thing to be done if a rudder is damaged?

A. Absolutely.

Q. Can the rudder itself after it is taken out in that way in any ordinary shipyard be straightened?

A. Yes, quite easily.

Q. A rudder stock with a twist of this kind I assume would have to be replaced—be renewed?

A. Be renewed.

Q. Can a rudder stock be constructed in any ordinary forge?

A. Yes, in any ordinary forge.

Q. Can you form an opinion under ordinary conditions how long it would take after the ship was put in dry dock to carry out this operation of putting the ship in perfect condition as to her rudder?

A. The only opinion I can give is what we can do in this port, it would take us between six and eight days to remove the rudder, straighten it, renew the stock and replace complete. I have been to Bremen, and from my observation I consider they are just as equipped and efficient in Bremen and Hamburg as we are here.

[fol. 442] Q. Would the operation that you have just described require discharging of any cargo whatever?

A. No.

Q. Which is the safer and more prudent, to sail with the rudder lashed amidships and the quadrant braked, or to remove the rudder entirely when going down a winding river and you don't know the condition of the rudder?

A. Remove it entirely.

Q. Is that or is it not a customary thing to do under such circumstances as I have described?

A. In this case the rudder should be removed to examine it and when found bad would not have been replaced.

Q. What have you to say as to the examination of the lower 3 or 4 feet of the rudder which is under water, by feeling with your hands or arms under water or by attempting to run a stick or boat hook under the water?

A. I should say a very careless method of examination.

Q. Could there be a bend in the rudder under water which this type of examination would not discover?

A. You could have a dangerous bend which could not be discovered by this method.

By the Commissioner:

Q. How much of a bend have you in mind when you say dangerous?

A. I have in mind somewhere about 5 or 10 degrees.

Q. Would you regard a bend of 5 degrees or any less as a dangerous bend?

A. Yes, under 5 I would not consider worth noticing very much.

By Mr. Longley:

Q. I assume perhaps this speaks for itself, but I take it the question of degree of bend to be very accurate would [fol. 443] require the dropping of lines, would it not?

A. Yes.

Q. Can one get any reasonable approximation of the amount of bend so far as exact degrees are concerned, by merely looking at it?

A. No, I would not attempt it.

Q. Are those who were actually in drydock after this second stranding when it was fully exposed, say whether or not they are in position to say whether it was a dangerous condition or not?

A. I should say they were.

Q. If the rudder is on the ship, what is the customary and prudent method which is followed by men in your profession to ascertain if the blade is straight and has not been bent?

A. In the first place we would have to have the ship absolutely dry on drydock. Under the circumstances we would stand under the after part of the rudder and sight it. If it did not sight perfectly true we would drop a plumb line down and gauge it that way.

Q. What have you to say as to lashing of the rudder with lines to the bitts, as shown in Exhibit 6 which you have examined, whether or not they would hold the rudder tight?

A. They would hold the rudder tight for ordinary navigation but would not stand any other outside strain.

Q. In view of the circumstances shown in the testimony here, which you have read, that this ship sailed at night with her rudder lashed amidships and with three tugs with the horsepower which has already been described, that the ship had had an impact against the bank which had caused this bend of the stock, and the rudder was not removed and the lower 3 to 4 feet of the rudder was not examined except in the way I have already described by feeling with [fol. 444] the arms and sticks, would you say whether or not that the owners were prudent or imprudent?

A. Imprudent I would say.

Q. Would you say whether or not under the circumstances it would be a customary thing for an owner to do to send the ship to sea?

A. No, it would not be a customary or proper thing to do.

Cross-examination.

By Mr. Haight:

Q. The owner customarily does what the classification surveyor and the underwriter's surveyor recommend, does he not?

A. Yes.

Q. You don't consider the owner imprudent if he follows precisely what is recommended by his underwriting surveyor and his classification surveyors?

A. The question is not relative to the case in point.

Q. I am asking you in general.

A. A general question, the owner does not ask the underwriter surveyor or the classification surveyor anything, he would not honestly commit himself. If the owner puts the case to the classification surveyor it is generally with the idea this is what I would do, I want your opinion on it.

Q. Well, if the owner explaining the facts to the classification surveyor and to the underwriters involved, is told by them it is perfectly all right to tow, go ahead, you would expect the owner to do just that, wouldn't you?

A. I would expect the owner to put his case before the underwriters or anyone he is consulting in a perfectly honest manner and satisfy himself that the information he had was correct, in that case naturally he would go by what the surveyor said.

Q. If, as a matter of fact, the representatives of the [fol. 445] owners in this case did fully state the facts and did honestly state the facts and were told by the classification surveyors and by the underwriters' surveyors to tow the boat, you wouldn't say they were imprudent, would you?

A. You have used the word "if", so how can you say? I don't believe they did tell the classification surveyor all, they were not able to.

Q. Exactly. So that your whole testimony is based upon assuming that either deliberately or through ignorance they gave the classification surveyor improper information?

A. They gave improper information because they didn't know it—I don't say there is anything behind why they did it.

Q. Either honestly or dishonestly, they gave wrong information?

A. I won't use the word "wrong", how can a thing be right if you don't know it—they gave them information which I might say they had no authority to give them.

Q. Well, if they honestly believed the rudder to be perfectly fair and if in fact the rudder was perfectly fair, then this towage was absolutely proper, wasn't it?

A. Yes, sir, if the information they gave the surveyors was what they truly and honestly believed, so far as they were concerned they acted right in acting on what the surveyor told them.

Q. Furthermore, if they were correct when they said the rudder was fair and was lashed amidships, no man could criticise the owner for towing the vessel under the circumstances, would they?

A. I would criticise them because they were saying something they didn't know.

Q. I am asking you to assume that they were not mistaken, that, as a matter of fact, the rudder was fair, then [fol. 446] no one would differ with them that the towage was proper, would they?

Mr. Longley: Referring to towage in general?

Q. (Continuing:) This particular towage?

A. I would disagree with them that the towage was right.

Q. Why?

A. Because the owners ought to know what is right and what is wrong.

Q. Let me assume then that this boat has been drydocked and all the water pumped out, the rudder has been sighted and has been found to be perfectly fair, you wouldn't criticise the owners for towing under the circumstances, would you?

A. I don't know whether the actual function of criticism of the owners is what I am supposed to give, if you ask me if I would take that ship away, I would say no I wouldn't.

Q. You have been asked one question, is it or is it not prudent, you have got to criticise the owner and say he is negligent or you have to say he wasn't negligent when you answer the question?

A. Well, the owner was both negligent and he acted on authority that he received from the surveyor.

Q. Well, go back to my assumption that this rudder I am assuming has been sighted and found absolutely fair, and that fact has been reported to the underwriters and to the classification surveyor and they say the ship is perfectly fit to tow, go ahead. Do you say it is not prudent for the owner to undertake the towage under the circumstances?

A. I would say it is legal but not prudent.

Q. Just why isn't it prudent?

[fol. 447] A. Because the owner with his knowledge of the river and knowing the ship was loaded, knowing that he had Diesel engines aboard the ship and also knowing the difficulty he would have in steering his vessel—roughly reading through—to my mind he took refuge behind a legal loophole he had of getting a surveyor to certify the ship was all right.

Q. Let us suppose that the classification surveyor is also intelligent and well posted, also suppose that his business is to issue certificates on the Weser River, that he knows far more about the Weser than you do or I do—let us suppose also that the underwriters committee is composed of men who know far more about the Weser than we do—is there any reason why the owner should he held to be negligent for undertaking the towage after all the other parties have approved of it?

Mr. Longley: I assume you don't want me to continue to interrupt with objections, I have permitted my brother to ask several questions about underwriters and negligence. I think perhaps the record should show that the measure of negligence is not what the owner should do in the way of getting endorsements or certificates from underwriters. I object to the whole line of examination for that reason.

The Commissioner: I think I get your point. I think it is well settled that seaworthiness is a question of fact, not of issuance or denial of certificates. The obtaining of certificates, however, may be material on the issue of due diligence.

Mr. Longley: I am afraid the law is against you on that. [fol. 448] Of course frequently such due diligence in relation to seaworthiness does not mean due diligence in——

The Commissioner: Don't let us argue the case at this point.

A. No, it is entirely up to the owners to act as they wish when they receive the certificates.

Q. I understood you to say that a vessel under her own power with her own rudder would practically always be safer and able to maneuver better than a vessel——

A. I didn't use the word "always" at all.

Q. Well, under what circumstances is a vessel without tugs and with her own rudder better off than she is with her rudder lashed and three tugs?

A. If she has to go through a narrow channel with not too much water in it and there isn't sufficient room to maneuver with a towboat without touching she is certainly better by herself.

Q. Would you say that a twin screw boat with three tugs that more than double her horsepower and with her rudder lashed, has less maneuvering power than the same boat going down a 300 foot channel?

A. I certainly would.

Q. Would it make any difference to you what speed she goes out?

A. Yes, a great deal of difference.

Q. What difference—suppose she is going over the ground 4 or 5 kilometers an hour, still better with her rudder than with tugs?

A. Of course, if you exaggerate the case, put her going over the ground very slow, her rudder would have no effect, going five or six knots the rudder is the best thing to have, of course.

Q. Suppose she is only going 5 kilometers an hour and there is a tide against her of 3, she is going 5 kilometers [fol. 449] over the ground against her about 3?

A. She would be better with her rudder than with tow boats.

Q. Suppose you wanted to slow up in the river and wait for a boat to go by, would you still rather have your rudder?

A. If you wanted to slow up, naturally you would go full speed astern on your engines.

Q. Why would you?

A. You want to stop her.

Q. Suppose you see her a couple of miles ahead, plenty of time, all you have to do is stop your engines and run your way off?

A. Naturally keep way on your ship so she won't go sideways.

Q. In other words, if going down a narrow channel and having a chance of meeting ships coming up, perhaps you would have to sail down very slowly, you would much rather have tugs than your own rudder, wouldn't you?

A. No necessity, the channel is so narrow there wouldn't be room for a towboat alongside.

Q. I am talking of a 300 foot channel that you have given us.

A. I would rather go with my own steam and rudder than with towboats.

Q. And if you wanted to wait in a channel for a vessel coming up to go by, it is better to have no tugs?

A. I would still keep control of my ship and not stop all the way on her.

Q. If you had to drop down to 1 or 2 kilometers, you would still rather have your own rudder?

A. I would far and away.

Q. Then under practically all circumstances that you can think of you would rather have had the "Isis" steer down the Weser with her own rudder?

A. Under all circumstances, after the boat was squared up in the river to come down, I would rather have the "Isis" by herself than any towboats.

Q. Do you say that it is negligence to undertake to tow [fol. 450] all ships when they can't navigate with their own rudder?

A. No, I never said that.

Q. All right. You know, of course, of hundreds of cases where vessels have been towed with their rudders amidships?

A. I know of hundreds of cases where vessels have been towed, that is what we have towboats for, naturally.

Q. It isn't negligence to tow a vessel with no steam on and her rudder amidships, is it?

A. All depends on conditions.

Q. Would you call it negligent to tow such a vessel up and down the Weser?

A. A loaded ship, yes.

Q. You would always consider it negligence to issue a certificate of seaworthiness to tow a vessel with a rudder lashed if she were loaded?

A. That is not quite the same question, Mr. Haight.

Q. What is the difference between a ship light and loaded?

A. A great deal of difference.

Q. I am asking you.

A. In the first place a light ship can go over places that she can't go loaded, it doesn't require so much effort to steer or take her around.

Q. Suppose you have a light ship in a channel 300 feet wide and we have a ship loaded with a channel 300 feet wide is there a difference between the light ship and the loaded ship?

A. Yes, you tell me the difference of water between the clay bottom of the river, then I might answer it it is a relative term.

Q. But is it increase in width of the channel alone which makes the distinction between light and loaded?

A. The combined depth of the ship and width of the channel.

Q. I don't yet quite understand why it is safer to tow a light ship than a loaded ship, except you said the channel would be wider, what advantage is there?

[fol. 451] A. She requires less towing power to tow a vessel, you have the same area to go in the channel, you have to make a much wider channel for a ship drawing 10 feet, light, than a ship drawing 30 feet, deep, you have a much wider channel to go in, also much easier to turn around than a deep ship.

By the Commissioner:

Q. Your towboats are the same draft, why is the channel wider?

A. Relatively, because the channel slopes down, the deepest part is in the center, if your ship only draws 10 feet, 10 foot soundings in the channel, naturally much wider than if she was 30 feet.

Q. But suppose your towboats draw 12 feet, they are on the wings?

A. All right, if drawing 12 feet, which is quite excessive for a towboat, you would have to limit the draft of your own ship to the towboat draft.

By Mr. Longley:

Q. There would be no difference in draft at all?

A. No, I didn't mention the towboat, only the ship, that is all.

By Mr. Haight:

Q. In docking ships, towboats of course are much better than her own——

A. Yes, oftentimes absolutely essential.

Q. So when making turns of that kind, a ship with her own power and rudder does not begin to be as useful as tugs?

A. No, absolutely, you are right there.

[fol. 452] Q. In other words, if making a short turn or handling a vessel that you can't anchor or don't want to anchor and you must swing the stern, tugs are infinitely better——

A. Depends how much room you have in making your short turns.

Q. You said it wasn't safe to rely upon twin screws. Isn't it true that vessels are very much helped in steering if they have twin screws?

A. Did I say it wasn't safe to rely on twin screws?

Q. I understood you to say that.

Mr. Longley: Twin screws alone.

Q. These weren't alone, we had three tugs and twin screws, and I understood you to say it was not safe to rely upon twin screws for steering purposes?

A. Let it go at that.

Q. Don't let it go at that, is that so?

A. Now you say for steering purposes.

Q. If isn't safe?

A. No.

Q. Aren't twin screws very helpful?

A. Very helpful.

Q. If you want to swing your boat to port and put your starboard engine to starboard and stop your port engine, does the effect of that maneuver substantially alter the heading of your boat?

A. Alter what?

Q. Alter the heading—working the starboard engine full speed ahead and stopping the port engine, does that materially swing your boat to port?

A. Yes, swing your boat to port.

Q. If you reverse your port engine——

A. If you accentuate your movement, it all depends what space you have, if you haven't got plenty of space you will be up against somebody before you get around.

Q. Isn't it true that a twin screw ship with her starboard [fol. 453] engine full ahead, port engine full astern can be turned around almost on her heel?

A. I wouldn't say almost on her heel, she can be turned in a small circle.

Q. A very small circle?

A. Yes.

Q. Now the navigation of the "Isis" going down the Weser is shown by the maneuver book, and the testimony proves that our three tugs were going ahead full speed and that practically all the steering was done by the twin screws, considering the fairly gradual bends of the river, wouldn't you consider that quite normal?

Mr. Longley: I object to the question, not in accordance with the evidence.

The Commissioner: Overruled.

A. But you must remember that the tugs are steering also, they have their helm working naturally, so that I say the "Isis" was not entirely steered by twin screw but steered by twin screw and the assistance of the stern tugs.

Q. You say that the port engine going astern would neutralize all benefit from the port tug?

A. I wouldn't say all—it would neutralize the greater part of the benefit, yes.

Q. They do have quadruple screw ships, don't they?

A. Yes.

Q. If you put them astern, does the after screw neutralize the effect of the forward screw?

A. You wouldn't put one ahead and one astern on one side of the ship.

Q. You could put both astern?

A. In this case the towboat is a separate floating article from the ship itself, the wash formed by the ship would have its effect to wash it forward out of the road, it is en- [fol. 454] tirely different than if it were part of the ship.

Q. Let us suppose the port engine and port tug going full speed astern, the tug wouldn't help?

A. It would help some, not the full effect of its power, it would practically neutralize——

Q. Wouldn't it be similar to having four screws, two on each side?

A. No.

Q. Why not?

A. Because four screws are working in solid water.

Q. The tug screw is further away from the ship's screw on the "Isis" than two quadruple screws on the port side would be?

A. I doubt it.

Q. If they were the same distance apart, it would be the same result?

A. The simile is not the same at all.

Q. Isn't it all in favor of the tug, because they are further away from the side of the ship?

A. No, because if the engine was going apparently astern the tug couldn't stay there, she would have to look after herself and get away.

Q. Regardless of the draft aft and how she was made fast?

A. Regardless of anything.

Q. You have said that daylight is always preferable, you are the third expert who has put it that way, what I want to know is do you consider it always negligent to go at night?

A. I don't think it best to go at night when you can go in the daytime.

Q. I am not considering or not concerned with what is best, I want to know is it always negligent to go at night?

A. No, it is not always negligent.

Q. Wouldn't you agree that if the head pilot says he would rather go at night on a clear night with the moon

shining and lights because he would have no trouble with [fol. 455] traffic, wouldn't you think the owner——

A. I think the owner would be influenced very much by that.

Q. Don't you think they should be influenced by that?

A. Yes, I would say they should be.

Q. The head pilot whose job it is to take all boats up and down and supervise it, would know more than you or anybody else on the subject, wouldn't he?

A. Yes, he ought to know his business.

Q. You said that with reference to the bending of the rudder and touching of the boat aft, as I understood, you don't think the captain has disclosed the full facts?

A. I didn't mean to put it that way, that looks as if I thought the captain had done something wrong.

Q. Just what did you mean?

A. The captain felt some vibration or bump and apparently he ascribed it to being astern the way the rudder bumped, I say he didn't know what it was when he felt the bump.

Q. Of course, you weren't on the bridge and he was. He was in a much better position to form an opinion as to whether he hit the bottom or not than you would be?

A. That is right, but you asked me the question.

Q. You didn't mean then that the captain had deliberately falsified the facts?

A. No, I never thought of such a thing.

Q. I thought it was a euphonious way of saying the captain hardly told the truth.

A. No, I am not euphonious.

Q. You know the captain does definitely say that twice he felt the jar of the ship hitting the bottom. Do you think it is not possible for a man on the bridge to know when a boat hits bottom?

A. No more than anybody else, I have been in a ship hit- [fol. 456] ting the bottom and icebergs, we always knew before the captain or anyone else, much plainer.

Q. Regardless of where you hit?

A. Not regardless of where we hit, I say we have hit things and even icebergs.

Q. When you have hit an iceberg head on, you knew more about it than the captain?

A. Knew it before.

Q. You say that if before the second stranding the blade of the propeller had hit the bottom and been bent, such a blow must have shown on the quadrant or in the lashings?

A. Absolutely.

Q. Isn't it a pure question as to whether the lashings plus the brake on the quadrant were stronger than the blade of the rudder?

A. The whole question of the strength of the weakest link, yes.

Q. If as matter of fact, the lashings made by the builders for the precise purpose to hove taut on blocks were taut, and if the quadrant was firmly held, and the combined strength of the lashings and the quadrant was greater than the strength of the blade, then the blade would bend and the others would remain taut.

A. The combined efforts of the brake and lashings were nothing, they are required to bend the bottom of the rudder, that is the answer to that question.

Q. Then you don't believe that a rudder blade can ever be bent without showing damage to the quadrant?

A. I don't say that it will, I never said such a thing, it wasn't put to me.

Q. Isn't that a necessary thing——

A. Not at all.

Q. Why not?

A. You are in a different position there, the quadrant hasn't anything to do with this case, it wasn't in gear, in [fol. 457] this case the engine is taken away and the quadrant held by a clamp, which according to this is like a vise.

Q. Who says the engines are taken away?

A. You can't manoeuver around with tugs if the engine is in, it doesn't say so, I am taking it that it is.

Q. It is the first I have heard that the steering engine is disconnected, there isn't a word of evidence as to that?

A. I know there isn't.

Q. You are starting out with something else, the steering engine is disconnected?

A. It doesn't matter—you can't get a shake which will bend the rudder 5 degrees without showing it on top. If

the steering engine is disconnected, which is proper with lashings on the rudder, it would carry away immediately. If the engine was in gear and holding it, the lashing on would show immediately if the pin bent or came down an inch and a half, the screw holding the brake on the quadrant, that would naturally show where it would hit.

Q. No matter how tight the lashings were?

A. No matter how tight the lashings were.

Q. It is absolutely impossible to hold with lashings and brake so as to bend the blade at all and not show?

A. That is right.

Q. Now you have known of cases where rudder stocks have been twisted and the rudder blade not bent at all, have you not?

A. Very seldom, I have known one or two, it isn't common though.

Q. Only one or two?

A. Only one or two.

Q. When a rudder stock is twisted by a heavy sea, the rudder blade is seldom bent?

A. Very rare occurrence.

Q. Ordinarily the rudder blade is not bent under the circumstances?

A. You can twist your stock without bending your blade, certainly.

[fol. 4558] Q. You have known cases of that kind frequently?

A. One or two, yes.

Q. If, as a matter of fact, a mud bank brings pressure against the rudder blade after the blade has been set into the bank, wouldn't that be comparable to a wave?

A. If you can guarantee that the mud bank will exert equal pressure on the whole area of the blade, I would say, but how can you do that?

Q. But if the mud bank brings pressure against the rudder over the same area that a wave hits the rudder, then the situation would be almost exactly alike, wouldn't it?

A. It is a hypothetical question, but it would be.

Q. About the same?

A. Yes.

Q. You have testified, Mr. McGregor, that you could have a dangerous bend which would not show even though

you had had a 16 foot rudder and 12 or 13 feet out of water?

A. Yes, you could have it.

Q. Won't you agree that if 12 or 13 feet of the rudder were perfectly fair and there was enough damage at the bottom of the rudder to make it dangerous, that you would readily detect that bend by putting a straight stick up against the side of the rudder?

A. No.

Q. You don't think so?

A. No. I take into consideration the method used by the people who examined the rudder as taken from the records. The method is a very slovenly and careless manner they went about it. I have my doubts that there was very much examination done at all, that is one of the reasons I base my opinion, like the light failing and the captain standing up on the bridge 20 feet away, in fact there is no individual record of any one person having made the actual operation they claim.

[fol. 459] Q. Made what operation?

A. I couldn't find one individual that is supposed to have put his stuff down, what he was or who he was.

Q. Regardless of the criticism of the people who did it, do I understand that if you did so properly it would be impossible to detect a dangerous bend in the rudder if the top 12 or 13 feet of the rudder were absolutely fair, by putting a stick along the side?

A. I say it would be impossible.

Q. And what do you call a dangerous bend, you said that less than 5 degrees would not be worth noticing, if you have 12 or 13 feet of your rudder absolutely fair and the bottom bent to a maximum at the lower tip of 5 degrees, would you call that worth noticing?

A. The word "dangerous" was used only to signify serious trouble with her blade, I am not qualified to state in number of degrees what you would call dangerous and what you would not call dangerous.

Q. Have you any opinion as to whether a 5 degree bend at the extreme tip is dangerous or not dangerous?

A. I would say it was getting dangerous, wouldn't say it was extraordinarily dangerous.

Q. I understood you to say that you couldn't get any idea about the fairness of the rudder blade by merely looking at it?

A. Not the way they looked at it.

Q. You subsequently said the right thing to do would be to sight it?

A. Yes.

Q. How do you sight it?

A. When your dock was entirely dry stand behind it and under it, you can't sight a blade on the same level when you see it with only a small portion

Q. What is the difference between being in back under and in back above?

[fol. 460] A. All the difference in the world, in one case you have got the whole sweep, something to make a comparison, under, but above you have no comparison to make whether it is vertical or isn't vertical.

Q. Being back and below is helpful?

A. Absolutely.

Q. Why isn't being back and above also helpful?

A. Because your speed pushes the bow out of water, you can't see.

Q. I am assuming the rudder is all out of water, does it make much difference whether back and below or back and above?

A. Yes, back and below is the better place.

Q. Back and level wouldn't be any good?

A. No good at all.

Q. Why?

A. You lose your line of sight, if you wanted to see if the ship is true, we have got to go under and look through the length of the ship, that is what I mean.

Q. You said that those who examined the boat after the second stranding were in the best position, of course, they weren't in any position to see the rudder as it was before the second stranding?

A. I naturally take it that the condition of the rudder in the second case is the same as in the first case.

Q. That is what I thought you meant.

A. Yes.

By the Commissioner:

Q. I didn't understand, Mr. McGregor, your testimony about the effect of the ship's propeller neutralizing the effect of the towboat's propeller:

A. My testimony was that the steamboat's propeller tended to lower the efficiency of the towboat's work rather than to neutralize it. I said that if four propellers are [fol. 461] merely twisting the stern, the towboat going astern at the same time, the action of the steamer's wash neutralizes the efficiency of the effect of the towboat's propeller because the towboat is working in a body of water which is going ahead and has no resistance on which to work, if the two streams of water had been sent forward at the same velocity there is no resistance to put the ship back, so that the first streams do the work and the second stream is just merely following into it. It hasn't slowed the body of water to get its resistance.

Q. What are you assuming with respect to the relative positions of the two propellers?

A. I am assuming that the propeller of the towboat is very slightly forward, perhaps 2 or 3 feet forward of the propeller of the steamer.

By Mr. Haight:

Q. How far away?

The Commissioner: Outboard?

A. Outboard not more than about 15 feet.

By the Commissioner:

Q. Then do I understand you to say that a propeller placed 15 feet outboard and 2 or 3 feet forward of the steamer's propeller would be operating almost entirely in the wash of the inboard propeller?

A. Yes.

Q. The steamer's propeller?

A. Yes—I wouldn't say working entirely, but the effect would be to neutralize the power of the towboat.

Q. Of course, I understand that two propellers operating anywhere near each other do not develop twice the power [fol. 462] of each propeller working separately, but I don't quite understand that they neutralize each other—do you

mean by that, that you get greater backing or turning power if you have the towboat shut down altogether?

A. No, you get almost the same efficiency of the main engine, the propeller is not interfered with in any shape or form, that is all right. When you want to add 800 horsepower of the towboat to the power of the main engine you don't get anything near the maximum power on each.

Q. From the point of view of turning power as to distance between the propeller and the median line of the vessel in the harbor?

A. If you can imagine a boat made fast to the bridge so that you could utilize the leverage from the center line of the ship, yes, in other words, a big beam towboat would give you more power than a small narrow boat alongside.

Q. Assuming even power on the ship, equal pitch, diameter etc. on the two propellers, you would be better off backing the towboat and leaving your main engines still?

A. You couldn't imagine that, but if you could and you had—as a matter of fact I have answered that question, it is very hypothetical. If you wanted the same power as on your main engines you would have to be much further away than I have just said, because the diameter of the propeller on the main engines is probably about 14 feet itself.

Q. Well, I was assuming the same diameter, same pitch, same power on the ship, all of which I appreciate is highly hypothetical, but if that were so, wouldn't you be better off backing your towboat, leaving your vessel's own propeller shut down?

A. If you could only use one or the other, do you mean? [fol. 463] Q. No, I mean wouldn't you develop more actual turning power that way than by working them both together?

A. I don't think so, not turning power, you lose some efficiency but you don't lose all of it.

Q. So that working them both astern is the maximum turning power?

A. Yes, the maximum turning power, certainly.

Q. Now the effect of a rudder in changing the direction of a vessel is to displace the stern outward rather than turn the bow inward, is it not?

A. Theoretically it does both, the steamer is supposed to turn on the center of gravity, which according to the load-

ing of the ship is close to the center of the ship, this ship being more down by the stern showing she has more cargo there, the center of gravity would be further aft than amid ships, but if the ship was perfectly light and on an even keel, the center of gravity would then be the center of the ship, that is the point around which she ought to turn.

Q. Well now suppose she hasn't any rudder at all and she is working one propeller astern and the other forward, is the turning effect exactly the same?

A. That I am not qualified to say—the effect is somewhat the same but I don't know about the degrees.

Q. What about the effect of the rudders of the towboats as a substitute for the rudder of the ship?

A. They both help the steering of the ship.

Q. Is the comparative area of the three rudders of any importance?

A. I shouldn't think so, you would have to take the area with the power, the angle at which the bow of the towboat is fastened to the ship itself, otherwise the angle of impact of the power on the stern.

Q. I understand your testimony in regard to the effect [fol. 464] of the two towboats on the wings of the flotilla is to add considerable to the power of the ship's engines but not necessarily the full additional power of the towboats?

A. That is correct.

Q. I suppose you wouldn't want to venture an opinion as to the degree of addition power?

A. No, that is a big mathematical question, you would have to know the volume of water and speed of the propeller, it could be worked out but we couldn't do it here.

Q. You haven't sufficient data?

A. Haven't sufficient data for it, no.

Libellant rests.

JAMES FRENCH, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Haight:

Q. Mr. French, you are chief surveyor of Lloyd's Register here in New York?

A. Yes.

Q. How long have you occupied that position?

A. Since 1916.

Q. Will you please state what your experience was before 1916.

A. My experience was I served my apprenticeship to the shipbuilding trade, after my apprenticeship, had about seven years in practical work, assisting the manager at the Walls End Slipway Repair Department, then I joined Lloyd's 36 years ago.

Q. And what have been your duties as a Lloyd's surveyor and subsequently as Lloyd's chief surveyor in New York?

A. My duties with Lloyd's in the building of ships to [fol. 465] supervise construction from the laying of the keel to completion; and in repairing of vessels on the dry dock for repairs and for carrying out of special surveys.

Q. Is it part of your duty to issue certificates of seaworthiness?

A. Yes.

Q. In handling of vessels where they have been repaired or where they are damaged and temporary certificates are required?

A. Both cases.

Q. During the entire period that you have been Lloyd's surveyor, have you been frequently called upon to issue certificates of seaworthiness and temporary certificates?

A. Yes.

Q. Mr. French, the steamship "Isis" according to Lloyds' Register was a vessel of 376.2 feet length, beam 51.8, depth of hold 25.9, her molded depth apparently was 28 feet 3¾ inches, she was a twin screw motorship developing a total of 2,400 horsepower, 1,200 horsepower on each engine. On the occasion involved in this suit her rudder stock had been twisted and her rudder, which otherwise was undamaged, was lashed amidships; her engines were in perfect running order. She was drawing 18 feet 5 inches forward and 23 feet 5 inches aft; she had a tug made fast forward with a horsepower of 1,080 and on a hawser about 30 meters to 35 meters long. She had two tugs made fast opposite No. 4 hatch, one on the port side having a horsepower of 800 and one on the starboard side 810. On a clear night with the moon shining she started in tow of these three tugs down the Weser River from Bremen. The tide

had started to run up the river about an hour and a half before she started down and was against her throughout her navigation at the rate of perhaps 3 kilometers per hour. [fol. 466] Will you please state whether or not from your experience the Isis under such conditions had adequate steerage capacity?

Mr. Longley: I object to the question as not being supported by the evidence.

Overruled.

A. I see no objection to the ship going down the Weser with two towboats steering and one towing.

Q. Would you have given her a temporary certificate of seaworthiness with her rudder lashed and other conditions as I have stated?

Mr. Longley: Objected to as irrelevant for the reason just noted and on the same ground.

Decision reserved.

A. Yes.

Q. Please state how frequently cases of twisted rudder stocks have come under your observation during your long experience with Lloyd's.

A. I have had many of those cases under my inspection, some of them have had the rudder heads twisted and some the lower part twisted.

Q. Is the twisting of a rudder stock a very rare unusual thing?

A. No.

Q. Have you had cases of such damage where it has been thought desirable to tow the ship to a repair yard or to some discharging berth?

A. When the rudder is damaged and out of commission we do tow the ship.

Q. Have you under such circumstances in the past given a seaworthy certificate?

A. We have given them from this port to Newport News. [fol. 467] Q. From New York you have the whole of the territory to Newport News?

A. Yes.

Q. Have you frequently issued such certificates?

A. Frequently.

Q. In your experience, what is it which usually causes the stock to twist?

A. Well, in many cases when a ship is backing the rudder is hard over and comes against the wall of the bank, that twists the rudder stock.

Q. Have you had many cases where a rudder stock has been twisted and the blade not bent?

A. Many cases.

Q. That is not for you an unusual phenomenon at all?

A. Not at all.

Q. What is it which ordinarily bends a rudder blade when the stock does not twist?

A. If a ship strikes a bank which is shallow it twists the lower part of the rudder blade and as a rule it does not affect the stock.

Q. Suppose you strike at the bottom with the rudder blade and only the bottom, what is the natural result, to twist the stock or bend the blade?

A. Bend the blade, the lower arm and the second arm.

Q. Have you had many cases where the blade has been bent and the stock not affected?

A. Yes, we have them.

Q. There has been testimony given here this afternoon, you have heard some of it, to the effect that it would be impossible to lash a rudder on both sides and pull the lashings taut with blocks and apply brakes on the quadrant so as to hold the rudder and not have the lashings slacked and the brake show a strain if the vessel hit the bottom enough to bend the rudder blade?

A. Where were the lashings fixed on the rudder?

[fol. 468] Q. At a regular place somewhere near the top where there was a little nick—the testimony is that there was a special place cut into the rudder into which they could fasten the lashings, they had a buckle on the end of wire cables which were provided by the owner for such a case, and that the lashings were run up and fastened to the bitts marked on the blueprint by the letter A, were hove taut by blocks and made fast. That in addition, down in the steering engineroom the brake was set up absolutely tight on the quadrant. Now the testimony is that if you had enough contact with the bottom of the rudder to bend it, the lashings must have slacked and the brake on the quadrant must have shown such an impact?

A. That quadrant would be shored, and that would keep it from moving, wouldn't it?

Q. My understanding is that the engine wasn't disconnected?

A. No.

Q. That the brake was tight and the lashings were there, do you think that it would be impossible to bend the bottom part of the rudder 5 degrees without slackening the lashings?

A. No, I think the lashings would slacken too.

Q. You think the lashings would slacken too?

A. Slightly, the bottom part would likely go and the upper part slightly slacken.

Q. If you had a bend of 5 degrees at the bottom at the maximum, in your judgment would it be impossible for the lashings to hold the top of the rudder while it was being bent to that extent?

A. At the top it would, but that is the middle you have there.

Q. Suppose it was higher up, I don't know where it was, somewhere in the rudder?

A. You have an eyebolt on top?

[fol. 469] Q. Suppose the lashings were somewhere near the top of the rudder and the quadrant was held, would it in your judgment be impossible to have the lashings tight enough and the brake tight enough to hold the rudder while the bottom bent 5 degrees?

A. I think it would.

Q. Will you please state whether or not in your experience a rudder which was perfectly fair from the top down 8 feet and which had a gradual bend, which at the maximum was 5 degrees at the bottom tip—whether or not such a bend would have any substantial effect upon the navigability of the ship?

A. I don't think it would.

Q. Have you had any cases where ships have on drydock disclosed bent rudders which weren't known to exist at all?

A. Yes.

Q. Please tell us about such cases.

A. We had one case, the steamer "C. O. Stillman", built in Bremen, and in going down the Weser for her trial trip she touched the ground. The vessel was inspected after

the trial trip and proceeded to sea and carried cargoes from January until August, then placed in drydock for the usual painting of her bottom. While in drydock it was found that the rudder was bent, the lower part, and the three lower arms also bent, which also set over the lower part of the stern frame she had to be unshipped, the palm of the upper stock plate cut adrift, the arms taken off and straightened, the plate straightened and put back, that ship had navigated and they didn't know there was anything the matter with the rudder.

Q. They had known when they touched the bottom of the river?

A. Yes.

Q. But had assumed that it had done no damage?

A. Yes.

[fol. 470] Q. How much was the rudder of the "Stillman" deflected from the true?

A. At least 5 degrees.

Q. Do you think it was something more than that?

A. That is right.

Q. Have you had other cases where rudders have been bent to the extent of 5 degrees without anybody knowing there was anything wrong at all?

A. Well, they have them when a ship comes in, I don't know if they knew it on the ship, when they dock we see them.

Q. The tugs, as I have stated, were made fast on the starboard and port side opposite No. 4 hatch. I show you a blueprint, Exhibit 6, will you state whether or not tugs made fast in that position were properly located?

A. I think they were.

Q. The vessel had a draft as I have stated of 18 feet 5 inches forward and 23 feet 5 inches aft, what would you say as to that as desirable trim for towing?

A. That trim is all right for towing.

Q. One of the witnesses examined today has testified that would be too much drag, that she shouldn't have more than one foot greater aft than forward, would you agree with that?

A. I don't see any reason why it shouldn't be towed with that difference in draft between forward and aft.

Q. Let us assume that the ship with the three tugs named, made fast as I have stated, is proceeding down the channel

of the Weser River which isn't straight, about 300 feet wide, were called upon to pass other vessels in the channel and to slow down perhaps to 2 or 3 kilometers an hour, in your judgment would the vessel with her own twin screws working properly, with her rudder lashed and with three tugs as stated have more or less steerage capacity than she [fol. 471] would have had if she had been running under her own steam with her rudder in perfect condition?

A. I should say at the speed she was going, she was better with the towboats.

Q. Would you have any doubts about that?

A. I would have no doubt of it.

Q. If you were called upon to navigate around fairly abrupt bends in a narrow channel, would you rather have three tugboats with your engines running and rudder lashed, or no tugboats and proceeding under your own steam with your own——

A. I am not a navigator you know, I don't want to get mixed up in that controversy, I would rather leave that to some navigator.

Q. Do you normally consider it prudent to dock a boat of say 7,000 tons deadweight capacity with most of her cargo in?

A. No, I do not, we don't recommend that.

Q. Normally about how much cargo do you put out?

A. About half the cargo, we recommend that.

Q. Discharge about half cargo?

A. Yes.

Q. You have had opportunity of examining the blueprint of the "Isis", Exhibit 6?

A. Yes.

Q. Can you tell me approximately how much water she would displace if she was on an even keel and her rudder 3 feet under water?

A. About 850 tons.

Q. And if 4 feet under water?

A. About 1,070.

Cross-examination.

By Mr. Longley:

Q. Was that 3 feet of the rudder under water?

A. Yes.

Q. That would mean about 5 feet from the bottom of the shoe?

A. It wasn't quite that on the plan I had.

[fol. 472] Q. There would be no strain whatever on the ship, would there, Mr. French, if the water was only reduced down to the second pintle in the rudder?

A. There is some strain on the ship.

Q. Not with proper care, is there?

A. Yes, the whole weight is on the keel.

Q. I say even if the water was reduced only to the second pintle on the rudder?

A. On top?

Q. Yes.

A. The second pintle—there there would be some strain on the ship because she is lying on the block, the whole weight on the block, the ship is on the block.

Q. But not the whole weight on the block?

A. Not the whole weight—a certain amount of water.

Q. You are now connected with Lloyd's, are you not?

A. I am.

Q. If I am wrong, correct me, but isn't it against the rules of your Society to do as you are doing now, testifying here as an expert?

A. I don't know that it is.

Q. Mr. French, haven't you a most definite rule of your Society that under no circumstances can you take an engagement to become an expert and give opinion evidence?

A. I was asked to give evidence on issuing a seaworthy certificate on a ship like this.

Q. Yes.

A. That is what we do.

Q. It is against the rules of your Society to become an expert and give opinion——

A. I am not an expert.

Q. You are not. Well then if I understand the situation here, you are only testifying about certificates?

A. Certificates, yes.

Q. And you don't feel qualified to express any opinion, you have told us, on navigation?

A. That is right.

[fol. 473] Q. That is you are not an expert, am I right, that you aren't qualified to express an opinion on anything in connection with this case except certificates?

A. I am stating those.

Q. On the contrary, you have expressed a lot of opinions?

A. Stating facts I have found.

Q. You never saw the "Isis"?

A. No, I have seen similar cases here, one as I stated I saw myself.

Q. Then I am right when I say that the rules of your Society do not permit you to take an engagement such as this engagement with Mr. Haight to come here voluntarily and give testimony such as you have given here?

A. We are not supposed to do that—expert testimony.

Q. That is what you are giving, isn't it?

A. I am giving testimony of the case here.

Q. Then we have come to this point, that it is against the rules of your Society for you to give expert or opinion testimony?

A. Yes—expert.

Q. So that if any of your testimony is to be considered as expert or opinion evidence, you have violated the rules of your employers?

A. That may be, if you take it that way.

Q. Mr. French, are we to assume that you think if a rudder goes stern first into a bank, that you would think customarily that the result would be that the stock would be twisted but the rudder blade would not be?

A. As a rule that is the case when it is the full depth of the rudder.

Q. You are assuming a case where the full depth of the rudder hits squarely against the mud?

A. Yes.

Q. That is the only situation that would result in the rudder blade itself being damaged and the stock being twisted?

A. Also against a stone wall—a quay wall.

[fol. 474] Q. Well, anything where the pressure against the rudder blade is even from top to bottom?

A. That is right.

Q. To do that, it is true, is it not, that you would have to assume the situation of your ship hitting against an even mud or clay wall?

A. Yes, practically that.

Q. If it wasn't an even mud or clay wall, you would expect a bend in the rudder blade, would you not?

A. Yes.

Q. My recollection is, Mr. French, that you expressed the opinion, I assume therefore as an expert, that it was quite all right for a ship under certain circumstances which Mr. Haight gave you, to sail under towage on a moonlight night?

A. I didn't say on a moonlight night—we only give a certificate for seaworthiness, when they sail we don't inquire.

Q. So as a matter of fact you are not qualified to pass on when a ship should sail?

A. No.

Q. I take it if I should ask you whether in your opinion a ship with limited steering capacity should sail at night or in daytime, you would feel you were not qualified to pass on it?

A. I am not a navigator.

Q. Your answer is you were not qualified?

A. That is so.

Q. I understood you to say in connection with towage, the three tugs that are mentioned, you said that would be two tugs steering and one towing?

A. Yes.

Q. That is because I take it, you are in accord with my suggestion I now make to you that the tug forward on a 30 to 35 meter line could not be of much assistance in steering the ship or changing her course in narrow waters?

[fol. 475] A. It could on a bend.

Q. Yes, but that is the only time, isn't it?

A. I am not a navigator.

Q. Well, you see you have expressed these opinions, Mr. French, in answer to Mr. Haight's questions. Are we to assume that these answers you have given are to be given any credence whatever because you know nothing about it?

A. No, I can say the two tugboats are for steering purposes.

Q. But you don't know whether they properly steer or not?

A. I wasn't on the ship.

Q. Any ship?

A. I could say particularly on that boat with twin screws and engines working.

Q. Then we have this opinion you have expressed, that you think so. That is one of the opinions you have expressed which is against the rules of your Society to express, isn't that so?

A. Well, you bring it out that way, I have to say something.

Q. You see why I am going into this, Mr. French, Mr. Haight has very properly asked you your business and you have told us you have been for 36 years Lloyd's surveyor, I have no doubt argument will be advanced here that for that reason your opinion is entitled to a great deal of weight as Lloyd's surveyor. I am trying to find out by what right or authority you come here as Lloyd's surveyor and express all these opinions, as I look at them, at least as I understand you, Mr. French, it is against all the rules of your Society to do so?

A. I can give an opinion in describing this particular thing here, two towboats and one ahead, whether I would give a seaworthy certificate.

Q. That you can do?

A. Yes.

[fol. 476] Q. That is all you think you are entitled to base your opinion on, is it?

A. That is what we do all the time.

Q. You told Mr. Haight that under certain circumstances you would have given a seaworthy certificate?

A. Yes.

Q. Some of the circumstances he mentioned to you were that the rudder was lashed amidships and, I recollect that his assumption was that the rudder was straight, that was true, was it not?

A. Yes.

Q. That there were three tugs of certain horsepower which he gave you and you said under those circumstances that you would give a seaworthiness certificate?

A. Yes.

Q. Again I want to ask you most definitely whether that would have any relation as to the time at which the ship should sail?

A. We don't give the time of day when a ship should sail.

Q. I give that premise because in his premise he asked if she would sail on a moonlight night?

A. We never give any time of day to sail.

Q. You leave that to the owner's prudence?

A. Absolutely.

Q. I take it, Mr. French, that you will agree with me that a rudder is an important part of the machinery of a ship?

A. Absolutely.

Q. And will you not also agree with me that if a rudder is bent, whatever number of tugs you may put on your ship, if it is bent sufficiently it can cause very serious danger?

A. No, I don't agree with you because ships come up here with rudders bent in bad condition, I don't know how they get here, and with towboats.

Q. They do it, but don't you agree with me that it is dangerous in narrow waters?

A. It depends on how much the rudder is bent.

[fol. 477] Q. Quite so. If your rudder was bent, you wouldn't consider it a prudent thing to start your ship out to sail down a river such as the Weser River which has been testified to as a narrow channel with heavy currents and severe bends, that wouldn't be prudent, would it?

Mr. Haight: Bent how much?

A. Without towboats?

Q. With towboats?

A. Well, I don't know, depends on how the rudder is bent.

Q. How much would you consider, if you are competent to pass on it—any of these questions that I ask you that you don't feel competent to express an opinion, you should tell me so.

A. That one bent 5 degrees, with towboats as it was, I don't see how it could not go.

Q. How much of a bend do you say would be dangerous?

A. I don't know, couldn't say.

Q. Because you are not competent to pass upon it?

A. I don't navigate.

Q. That is the reason?

A. Yes.

Q. Why are you competent to pass on 5 degrees?

A. We have had a big boat with 5 degrees come down the Weser.

Q. The "Stillman"?

A. Yes, I saw her.

Q. How do you know she came down without difficulty?

A. She did come down without difficulty, traded on her routes six or seven months.

Q. What you mean is she didn't strand?

A. She touched ground coming down the Weser from the builders' yard.

Q. You assume that touching caused a bend in the rudder?

A. Yes, she hadn't been ashore after that.

[fol. 478] Q. Then she navigated how long after?

A. The end of January to the end of August.

Q. You saw her in August?

A. In August.

Q. What right have you to assume that the bend occurred at the time of the stranding in the Weser River?

A. That is what they stated.

Q. Stated to you?

A. It was in the logbooks.

Q. That is all you know about it?

A. That is all I know, the logbooks.

Q. How can you know anything about whether the ship had tended to sheer to one side or another during that time?

A. That is what the captain said, he didn't notice any difference in steering.

Q. That is all you rely on?

A. That is all I know.

Q. I take it you can conceive, Mr. French, of a ship going astern against a bank and twisting the rudder stock and also twisting the blade?

A. Sometimes it may do that, I don't know.

Q. You know it does do that sometimes, don't you?

A. Maybe—we have a little bend at the bottom as well at times.

Q. That depends on the depth of the bank against which it hits?

A. Yes.

Q. Now about that opinion, as I look at it, you have expressed, when a ship touched as the master has said—touched twice—just before the second stranding, do I understand that in spite of the fact that it may have hit

and bent its rudder it would not have any effect whatever, or might not have any effect whatever on the lines or on the quadrant, assuming that quadrant is braked?

A. I don't think it would have any, we handle them that way all the time, and nothing on the quadrant.

[fol. 479] Q. You don't ordinarily hit your rudder?

A. A lot of ships do, we have that damage.

Q. Perhaps you don't understand the question. Am I to understand that it is your testimony that if you lash your rudder amidships with lines running to this point marked A on the chart you have examined, and with the quadrant braked with a screw in the shape of a vise, as has been testified to here, that in your opinion that rudder could hit with sufficient force so it would bend the bottom of the rudder and still leave the lines intact and the quadrant showing no marring, no effect whatever?

A. Yes, if the lashings was at the top, as is stated here.

Q. Suppose the lashings were not on top?

A. Then it would show lower down too, because

Q. If the lashing was at the middle of the rudder it would show very readily?

A. If it was bent well up, depends on the height of the bend on the blade.

Q. What about the quadrant?

A. The quadrant may not move, it is fixed.

Q. What about the screws, do you mean you could have a blow against that rudder that would not affect that quadrant?

A. If the quadrant is shored and fixed, it would not.

Q. What do you mean by shoring?

A. Wooden shores and wedges in addition.

Q. The testimony here is that the only way it was fixed was by screwing down the screw on the brake?

A. If they didn't let go there would be nothing else, if the rudder were bent at the bottom.

Q. If the rudder bent at the bottom hit sufficiently to do that, don't you agree it would show up on this one brake?

[fol. 480] A. It doesn't always prove that way, the "Stillman" didn't prove that way.

Q. Was the quadrant braked in the "Stillman" case?

A. No, it wasn't, but the chain was in gear.

Q. I am talking about the quadrant being braked with a screw?

A. It would be the same thing.

Q. Anyway, the one who braked it and looked at it afterward would be in a better position, I take it, than anyone else to tell what had or had not happened?

A. Yes, better than anyone who hadn't seen it, I should say.

Q. If you knew that the ship had hit hard aft with a heavy impact against the bank and that your rudder stock had become bent as a result to the extent of some 45 degrees, would you issue a certificate of seaworthiness to permit that ship to sail down narrow waters without having a careful examination made of the rudder blade?

A. Well, the rudder blade was examined.

Q. Just answer the question.

A. We would have a diver down to examine it and get a diver's report on it.

Q. Are we to understand that is all you do about your rudder?

A. Get the diver's report and put the rudder over to amidships, see how far it was twisted—the stock.

Q. I am speaking of the blade, you see, particularly.

A. Just put the blade in the center to find out how much it was off.

Q. How would a diver go about doing that?

A. Put the blade amidships.

Q. What would the diver do about it?

A. Examine the blade and pintle, see if it was bent.

Q. How could a diver tell how much the rudder was bent?

A. He couldn't tell exactly to a degree but he could see how it was bent.

[fol. 481] Q. He could see if it was bent seriously?

A. Yes.

Q. Do you mean to say that in your opinion—if you are not in position to tell us, say so—I assume you have never been a diver?

A. No.

Q. Are you in position to tell what a diver could see then, Mr. French?

A. Not at all.

Q. Am I to understand that you would issue a certificate of seaworthiness without you yourself knowing by examination what condition that rudder was in?

A. Yes, and we would attach the diver's report with our report.

Q. Suppose the diver reported that the rudder was bent 20 degrees, what would you do then?

A. In all probability lift the rudder, I think.

Q. What about 15 degrees?

A. I don't know what degree you are going to, but 5 degrees to my mind we would let her go.

Q. Well, it is a question of degree?

A. It is a question of degree—I guess 15 degrees would be too much.

Q. How about 10?

A. Even 10.

Q. 10 would be too much?

A. Yes, but I don't think 5 would interfere any at all.

Q. You think the question is between 5 or 10, you think if 10 degrees you would insist on the rudder being lifted?

A. I think so, that is a ship steaming along without any tugs.

Q. And 5 degrees you think it should not?

A. That is twisted at the bottom 5 degrees, I don't say the whole way up.

Q. Well, supposing it is halfway down, now what?

A. That would depend on the whole extent, it would not be 5 degrees at the top, but at the bottom.

Q. Suppose it starts at nothing at the middle and be-
[fol. 482] comes 5 at the bottom?

A. I don't think that would interfere.

Q. Suppose it starts at nothing at the middle and becomes 10 at the bottom?

A. That is another thing altogether.

Q. Then you feel it should be lifted?

A. It should be.

Q. You spoke of a ship going to sail without the use of tugs?

A. Yes.

Q. Suppose she was going to sail with tugs such as have been explained to you here, do you mean to say you would still let her sail if she had a 10-degree slant or sheer?

A. I wouldn't say that.

Q. That is why I want to know why you mention tugs. If it started at the center of the rudder and went off to 10 degrees at the bottom, even though going to use tugs would not you insist under those circumstances that the rudder be lifted and straightened?

A. I am not sure, I wouldn't say that.

Q. That is rather on the border line, you mean?

A. Yes.

Q. How do you go about determining how much a rudder blade is bent?

A. We have no rule for it.

Q. I mean as to number of degrees.

A. We have no rule for it, a matter of judgment.

Q. How do you form your judgment?

A. By the appearance of the rudder.

Q. How do you stand and look at it?

A. Stand back and look at it.

Q. Don't stand under it?

A. No, you have to stand back.

Q. You stand back of the rudder?

A. Yes, behind the rudder.

[fol. 483] Q. Then you form an estimate?

A. We can take the degrees by measurement—I mean see if it is in line.

Q. Then you find just how many degrees it is out and you can find, I assume, by dropping a line, whether 5 or 10 degrees?

A. Easy to take the degrees.

Q. Here again, I take it, you will agree with me that the men who actually saw this rudder and saw the bend in it are in a much better position to form an opinion as to whether or not it was in a dangerous condition than you or anyone else is sitting here?

Mr. Haight: The question is objected to, no witness has said he saw any bend in the rudder before she started down the Weser.

Overruled.

A. The man on the spot was the one to judge best.

Q. He can judge best whether the bend he sees is dangerous or not?

A. Well, depending on who examines it.

Q. The marine superintendent of a line like the Hamburg-American?

A. Yes, he ought to.

Q. Or the master of the ship?

A. Yes.

Q. You will agree with me, will you not that even a 5 degree bend will have some effect on the navigation of the ship?

A. I should say it would.

Q. You have understood I have been talking about degrees?

A. Yes.

Q. You will agree that 5 degrees will have some effect on the navigation of the ship?

A. It ought to have some effect.

Q. That is something you don't know about?

[fol. 484] A. I am not a navigator, but in my judgment it should have some effect.

Q. If it is a 5 degree bend to starboard, it will have some effect in your opinion in making the ship sheer to starboard, will it not?

A. That depends upon the way on it.

Q. Can you express an opinion on this, Mr. French, can you conceive of a situation where a ship can go over a shallow spot and hit her rudder and damage that and not damage the stern frame, or isn't that a matter that you are competent to express an opinion on?

A. This happened to be just the post, not the frame.

Q. I should have said the shoe.

A. She hasn't got a shoe.

Q. What will we call this (indicating)?

A. The stern post, no shoe on that. In the case of the "Stillman", as I told you, there was no evidence at all of any damage on the end of that keel or lower part of the stern post.

Q. Of course you don't know the circumstances under which that damage occurred?

A. I have the logbook, that is all.

Q. You expressed the opinion, as I understood you, that three tugs would give the ship more steering capacity at the speed this ship was going, according to the evidence here——

A. I should think it would.

Q. (Continuing) than the ship would have if she was going under her own power and was using her rudder, how are you competent to express an opinion on that?

A. I am just saying that a ship going the speed that the ship was going, the rudder would not be so effective as the two towboats aft.

Q. You mean because she was going so slowly?

[fol. 485] A. Yes, working one engine and the other, twin screw—I am not a navigator, I imagine that.

Q. Well, you are not a navigator, is your opinion worth very much weight on that problem—do you say that your opinion in the matter is worth anything to us here?

A. I think it is.

Q. If you are not a navigator, Mr. French——

A. I am not a navigator.

Q. (Continuing.) How are you competent to express an opinion?

A. My own opinion.

Q. And your opinion—I want to understand most definitely that in stating that opinion you are referring to the particular speed which the testimony shows that this boat was going?

A. Any ship going at a speed like that.

Q. That any ship was going as shown in this record?

A. Yes.

Redirect examination.

By Mr. Haight:

Q. Mr. French, I was entirely innocent of any purpose to ask you to in any way violate your rules?

A. Yes.

Q. I didn't know there was such a rule. I have some questions I would like to ask you, but if you wish I will waive them and stop the examination right here.

A. You had better waive them, I think.

By the Commissioner:

Q. I think I should like to ask Mr. French one question, in view of his answer to the original hypothetical question. I think that was based among other things on the rudder being fair and straight?

A. Yes.

Q. Would your answer be any different if a rudder instead of being straight had in fact a 5 degree deflection [fol. 486] from the true in the lower half of it?

A. 5 degrees would not go up any distance.

Q. About halfway up?

A. It wouldn't go halfway up.

Q. If it did in fact go as much as halfway up and showed a deflection of 5 degrees, would your answer be any different?

A. It would have an effect on the ship under her own power, I should imagine that anyway, although as I say that ship I quote, they never felt or knew any difference.

Q. I think your answer to the hypothetical question as it was put to you was that you would approve the vessel under those various conditions going down the Weser River?

A. With the towboats they had.

Q. Now my present inquiry is whether your answer would be any different if the rudder in fact had this 5 degree distortion?

A. Well, it is a peculiar thing, sometimes a rudder is just bent up at the bottom, other times it is a long streak bent, you can't always get them the same way. I don't think with a loaded ship like that, 5 degrees would have affected anything going down with those two boats steering at the speed the ship would be going.

By Mr. Haight:

Q. Suppose the rudder has been exposed and seen to a point somewhat below the fourth arm and has been found fair from the top for a matter of 12 or 13 feet, and the bend subsequently disclosed is at the maximum of 5 degrees and at the very bottom?

A. It would have the same effect as halfway up.

Q. Would you hesitate to give a ship a certificate of seaworthiness with those three tugs to go down?

A. No.

[fol. 487] By Mr. Longley:

Q. You are referring to giving seaworthiness certificates in sailing from New York, are you?

A. Well, of course, whatever port we are in, if I was in a port in Bremen I could do the same thing.

Q. Sailing down a tortuous river like the Weser?

A. Yes.

Q. A defect in the rudder would not affect your judgment whatever?

A. At the speed the ship was going——

Q. I am not talking about speed.

A. You have to take that into consideration the speed she was going with the towboats, she would be dragging the towboats if going full speed.

Q. Are you assuming she isn't going to use her engines?

A. No, not at all, I think the engines could go slow.

WALTER N. DAVIS, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Haight:

Q. Captain Davis, what is your present position and title, please?

A. Vice-President, Merritt-Chapman-Scott.

Q. In charge of what particular work?

A. Marine Department, including salvage.

Q. How long have you been with Merritt-Chapman-Scott and the predecessor companies?

A. Over 33 years.

Q. During that time you have been engaged almost entirely in salvage work?

A. Entirely in salvage work until the last few months.

[fol. 488] Q. In the course of your work as wreckmaster, will you please state whether or not you have frequently towed damaged ships?

A. I have.

Q. Have you towed ships with rudders off?

A. Yes.

Q. Have you towed ships with rudders bent?

A. Yes.

Q. Have you towed ships with stern frames gone?

A. Yes.

Q. Have you towed ships with engines dead?

A. Yes.

Q. Will you please give us one or two illustrations of vessels which you have towed with damaged steering gear, through narrow channels?

A. The steamer "Lexington" of the Merchants & Miners, took her up the Savannah River to Savannah. Took the steamer "Chaparel" into San Juan. The "F. D. Asche" out of a narrow channel from Stranger Key, Bahamas, into New York, through the old main ship channel. I have taken the "Moldegaard" into an anchorage through a narrow channel and anchored east of Nassau. I put a temporary rudder on the "Silver Maple", but I didn't actually do the handling of the ship, I went on board of her when she came to New York.

Q. Do you remember the case of the "Robin Adair"?

A. I was asked to quote on bringing her from Boston, stopping at Providence, discharging some cargo, bringing her to New York with the remainder, and I got up a figure to quote, but they decided to dock her, they found a dock was available in Boston.

Q. You were asked to give a tender on towing her?

A. Yes.

Q. What was her condition?

A. As described to me, she had bent her rudder stock or [fol. 489] damaged her rudder so it was useless and would have to be steered by tugs.

Q. In towing the Lexington up the Savannah River, how many tugs did you have?

A. I had two tugs and a barge.

Q. And which boat was ahead?

A. The "Relief" was ahead, I had the barge on one side and tug on the other side, steering her with them.

Q. How could you use the barge for steering purposes?

A. By leaving her breast lines a little slack.

Q. Slackening off on her breast lines?

A. Yes.

Q. Easy to steer?

A. Yes.

Q. You took her up the Savannah River without difficulty?

A. Yes.

Q. Where did you tow the "Asche," and what was her condition?

A. Her rudder and stern frame was gone. Her engine could be used and we brought her out through—first we took her in through a narrow channel to get into a sheltered anchorage to work on her, then we brought her out through

that channel some three weeks later, brought her to New York.

Q. How many tugs did you have?

A. Two.

Q. Where were they located?

A. When doing the channel navigation we had one astern and one ahead.

Q. Did you have any difficulty in controlling her?

A. No.

Q. How big a ship was she?

A. She was about 425 feet long and 60 feet beam.

Q. How big a boat was the "Robin Adair" that you estimated on?

A. I think 410 feet, something over 400 feet long.

Q. The "Chaparel" into San Juan, what was wrong with her?

A. She was a smaller ship, one of the lake type steamers, [fol. 490] built up on the Lakes, St. Lawrence Canal size, 251 feet between perpendiculars.

Q. What was wrong with her?

A. Her rudder and stern frame entirely gone, she was by the head a few inches, made her sheer very badly.

Q. How many tugs did you have getting her into San Juan?

A. Only had the "Relief," sent a wireless in to get another boat but couldn't get her, had to get on the best we could without her.

Q. Did you get her in without hitting anything?

A. Yes.

Q. What was the damage to the "Moldegaard"?

A. She broke her stern frame and bent the rudder and also tore the shell plating around where the rudder stock went up, so the rudder would swing out in all directions. We took her into this anchorage and got the pintle and put it—lined up the top pintle and put it in so that although the rudder was bent we could use it, it had some effect on the ship.

Q. How badly was the rudder bent?

A. Well, it is many years ago, I don't remember exactly, but it was bent sideways as well as twisted—the thickest bend to my recollection was sideways perhaps, so at the bottom it was 8 or 9 feet out of line—bent over to one side.

Q. How many tugs did you have handling her?

A. Well, we took her in with one, but we had two bringing her out.

Q. How far did you tow her with two tugs?

A. We brought her to New York, we cast the stern tug off and let her go ahead after we got out through the channel.

Q. Through what channel?

A. We had her in a reef anchored up to the eastward of Nassau.

Q. You had to get her out through a narrow channel?

A. Yes.

[fol. 491] Q. And two tugs handled her all right?

A. Yes.

Q. How often have you seen vessels with twisted stocks—rudder stocks?

A. I couldn't tell that, I have seen quite a number.

Q. Is it a usual kind of damage, in your experience?

A. Why, yes, I think so, we read about it in the shipping papers quite frequently, every few months.

Q. Have you yourself had cases where the rudder stock has been twisted?

A. Yes, frequently.

Q. How many times a year, roughly speaking, do you see a vessel that has had a twisted rudder stock?

A. Well, I couldn't swear to that, I wouldn't like to testify to that under oath, but I have an impression maybe once or twice a year.

Q. In your experience, what kind of pressure against the rudder is it which causes the rudder stock to twist?

A. Well, I have known of cases of ships dragging ashore stern first, the back of the blade coming in contact with rocks, twisting the rudder stock.

Q. Have you known of cases where the rudder stock has been twisted by a heavy sea?

A. I have read about them, in the case of the "Silver Maple" it was broken by a heavy sea.

Q. Have you seen cases where the rudder stock has been twisted and the blade of the rudder not bent?

A. I can't recollect a specific case.

Q. In your experience, what kind of a blow is it which causes the rudder to bend where the stock isn't twisted?

A. Well, my experience has been mostly confined to ships pounding on the bottom and ships that have been ashore.

Q. Do you find that when the rudder hits the bottom that—

A. Then we have bent stocks and we have rudders bent [fol. 492] up sideways, in some cases we have rudders broken off. In the last between 20 and 30 years there has been a great change in the construction of rudders, the most common type is the frame rudder plated over from 30 to 35 years ago. Now it is a different construction, welded arms on either side of a single plate.

Q. The steamship "Isis" was according to Lloyd's figures 376.2 long, 51.8 feet beam, 25.9 depth of hold, and from the blueprint she was 28 feet 3¾ inches molded depth. She carried deadweight about 7000 tons of cargo, she was a twin screw motorship and each engine developed approximately 1200 horsepower. On the occasion involved in this suit her rudder stock had been twisted and her rudder, which otherwise was undamaged, was lashed amidships. Her engines were in perfect running order and she was drawing 18 feet 5 inches forward, 23 feet 5 inches aft. She had a tug forward on a hawser of 30 to 35 meters, on a horsepower of 1080, and two tugs made fast opposite No. 4 hatch, the one on the port side having power of 800 horsepower, the one on the starboard 810. On a clear night with the moon shining she started down the Weser River from Bremen to the North Sea, about an hour and a half after the tide had turned up the river. Will you please state whether in your opinion a vessel of that size with twin screws running, with her rudder lashed, with three tugs was fit to navigate the Weser River with a channel about 300 feet wide?

Mr. Longley: Objected to as not supported by the evidence in connection with the rudder blade.

Overruled.

[fol. 493] A. I am of the opinion that the vessel was safe to navigate the river. I don't know the river of course, I have never been there, but from the description I think the vessel was safe to navigate the river.

By the Commissioner:

Q. Would your answer be any different, Captain Davis, if the rudder in fact was not straight but was deflected from the true about 5 degrees, running from nothing at the center to the maximum of 5 degrees at the bottom?

A. May I see the shape of the rudder (referring to Exhibit 6) if that was ascertained, the rudder could be secured in such a position that the effect would be neutral.

Q. I am assuming that the rudder was set on straight so that there would be an actual deflection from the median line of the vessel of 5 degrees?

A. It would interfere, but with the tugs she would still be—they could still handle her.

By Mr. Haight:

Q. If as a matter of fact the vessel was dry-docked and the water came down, at the lowest, just below the fourth arm from the top, and if that part of the rudder exposed was found to be perfectly fair, if a diver had gone down and reported that the whole of the rudder was fair and if the examination made with a stick on the rudder by daylight and a heavy searchlight at night had disclosed no bend at all, would you hesitate to tow the vessel?

A. Not at all.

Q. You see by Exhibit 6, the blueprint, the location of [fol. 494] No. 4 hatch. Assume that the tugs are made fast opposite No. 4 hatch and that the vessel has a draft of 18 feet 5 inches forward, 23 feet 5 inches aft, will you please state whether or not in your opinion the tugs are located properly?

A. Yes, I should say so, in the usual place for handling a ship.

Q. One witness called this afternoon has testified that a draft of 23 feet 5 aft and 18 feet 5 forward gives her too much draft aft for satisactory handling. Do you agree to that?

A. No, my experience has been that the more draw the better control you have—the more drag a ship has the better control you have unless she drew too little, unless the difference was so great and there was a strong breeze, but so far as going through the water goes, with any light or moderate breezes, the more drag the vessel has the easier it is to control her with tugs.

Q. When you are yourself handling a vessel damaged at the stern, the rudder or stern frame etc., do you trim them so they have substantial drag?

A. Always do when we can.

Q. That has been your practice and your experience throughout your whole salvage work?

A. Yes.

Q. Some of the witnesses called have testified that under practically all circumstances a vessel under her own steam with her rudder in operation can be handled better than a vessel with her rudder lashed amidships and three tugs of the power I have described. Would that be your experience?

A. At high speeds a ship can be handled better with her rudder than with tugs. At low speed, the tugs are better.

Q. Suppose you were called upon to stop a vessel in a [fol. 495] narrow channel like the Weser to wait for a ship to come up the river and you had a tide running against you of about three kilometers per hour, which would you prefer, to have three tugs as the "Isis" had and the rudder lashed, or to have your own engines and your rudder in working order?

A. The tugs.

Q. Would there be any question in your mind about it?

A. No question at all about that.

Q. I show you Respondent's Exhibit 9. The "Isis" was maneuvered by her tugs out into the river at the point which I mark X in a circle. She proceeded from that point down the channel until she reached the intersection of the Lesum at Vegesack in a river of the contour shown by the chart and with the channel approximately 300 feet wide. Would you consider the "Isis" fit to tow with the tugs and other conditions as described?

Mr. Longley: I object to the question on the ground that I have already mentioned, that the testimony establishes he had trouble before she got to the Lesum.

Overruled.

A. I would.

Q. Captain, suppose that the pilot of the "Isis", while still above the 17th kilometer, sees another vessel around the bend coming up the river with the three tugs assisting, would it in your opinion have been perfectly feasible for him to have slowed his vessel or even stopped her and to have waited for the other vessel to pass him in the channel before he got down to the Lesum?

A. It would.

Q. How complete control in your experience would three [fol. 496] tugs of this size have of a ship no longer than 365 feet?

A. Well, at slow speeds, complete control.

Q. Could they stop her dead over the ground?

A. Against a head current they should have been able to have kept her right within 10 or 15 feet of any position, practically still.

Q. As long as you liked?

A. As long as they had the current.

Q. As long as the current was running up river against them?

A. Yes, as long as the current was running up river.

Q. Do you frequently use divers to make examinations of the conditions under water, the condition of rudder or condition of the bottom?

A. Yes.

Q. Do you find that the divers' reports are reliable?

Mr. Longley: Objected to as quite irrelevant whether Merritt-Chapman & Scott's reports are reliable or not.

Objection sustained.

Q. Do you find that certificates of seaworthiness—temporary certificates—are given on divers' reports?

A. I do.

Mr. Longley: Objected to as irrelevant.

The Commissioner: Objection sustained. Taken subject to the objection.

Cross-examination.

By Mr. Longley:

Q. Captain Davis, do you not agree with me that in matters of the sea things can be taken care of much better in daytime than in night time?

A. I do agree with you, yes.

[fol. 497] Q. And in narrow waters it is also easier to navigate a ship in daytime than night time, is it not?

A. No doubt.

Q. And much safer, by the same token?

A. I should think so.

Q. I assume that you hold a master's papers and have held them for many years?

A. Yes, British and American too.

Q. You will agree with me, will you not, that if a ship hits her rudder against the bank with a severe blow sufficient to bend the rudder stock 45 degrees, that it would not be at all strange if the rudder blade was bent?

A. No—I agree with you.

Q. Don't you think it would be somewhat strange if the rudder stock was not bent?

A. If the rudder stock——

Q. I mean if the rudder blade was not bent, assuming that your rudder stock is bent 45 degrees as a result of the blade hitting against the bank?

A. It is quite—of course we are speaking of this type of rudder, when the whole rudder came out behind there the blade would not be damaged at all, the stock would be twisted. With this type of rudder it would depend on the nature of the blow and all that.

Q. As to strength?

A. Yes, a ship backing—with the leverage, say a ship comes against a pier wall or against anything like that when backing, part of the blade—the leverage is so great that the thing to go first logically is the rudder stock. Rudders are calculated to stand the strain of the sea over the full area of the blade. When the force of the blow comes right on the after edge of the blade, on the end say of one of the long [fol. 498] arms that are welded onto the stock, they have so much leverage that the stock is the weak point and it would be logical that with the right kind of a blow, backing up against a dock wall or backing so the full blow is on the blade part of the rudder, the rudder shaped like that might be 50-50—even chances, or perhaps the chances of the stock being bent would be greater than the blade being bent or the blade even showing any indication of damage.

Mr. Haight: By the stock bent, you mean the stock twisted?

The Witness: Yes, the stock twisted.

Q. Must you not assume, if you assume that the rudder blade is not bent although the stock is twisted, that the whole area of the rudder blade has been subjected to an even pressure?

A. Not necessarily. I think that the rudder stocks—I know—not by first-hand knowledge but by what people that I believe have told me—that the rudder stocks are very often bent by backing into something, collision with a dock wall or with another vessel.

Q. With collision with a dock wall, you would have even pressure against the wall?

A. The pressure is right on the back edge of the blade.

Q. But even from the top to bottom of the blade?

A. Not necessarily, this ship has a pretty straight back, which——

Q. I am referring of course to this rudder.

A. In her case it would be backing against a dock wall if the dock wall was straight it would be even pressure on the edge, but I think that if you got even pressure on any one of those arms, the pressure of backing into something with [fol. 499] the rudder aft; the rudder stock logically would twist before anything else would give way.

Q. It would show considerable marking of the rudder if any such thing occurred, wouldn't it—scratching?

A. It should if it was against a stone wall, if against wood why it would rub off a little paint.

Q. Let us go to the second stranding you have heard about. If the bottom of the rudder was bent to starboard, I take it you will agree with me that is quite conclusive proof that she must have hit something from the port side?

A. I should say so, yes.

Q. Don't you also agree with me that that would have to be a fairly severe blow?

A. Why, yes.

Q. Don't you also agree with me that those in the engineering room would best know if any such blow had occurred?

A. I don't think the engineers would be able to tell a blow on the rudder, they can tell a blow on the propeller or something perhaps under the engine room, but not the rudder or stern frame, around there.

Q. I presume that is a thing the engineers are better qualified to pass on probably, isn't that so?

A. Well, I think perhaps so, although I have been in the engine room quite a lot as a wreckmaster with the pump pounding and thumping around.

Q. If you have your rudder quadrant fixed with two screws or one screw—there seems to be a difference in the evidence whether it was one screw or two—do you not agree with me that if you have any such impact that it would show in any such screws—is that not so?

A. I can't—I would have to see how it was secured to answer that question intelligently, to be sure of my answer. [fol. 500] Q. In any event, the man that fixed it and saw it both before and after the second stranding is in the best position to express an opinion on that, is he not?

A. Yes, I should think so.

Q. Those cases of towage that you have referred to here, none of them were cases of towage for any considerable distance through narrow waters, were they?

A. No.

Q. Perhaps the longest towage of these you have mentioned through narrow waters was up the Savannah River to Savannah?

A. Yes.

Q. The Savannah River is a pretty broad river up to Savannah, is it not?

A. Yes, I don't remember the width just now.

Q. A lot broader than 300 feet?

A. Yes.

Q. And between the mouth of the Savannah there are no bends—

A. Oh, yes.

Q. Are there many?

A. I don't remember.

Q. I mean are there sharp bends?

A. There are one or two curves in the river, it depends on the definition of a sharp bend. I recollect one curve there.

Q. How far is it from the mouth up to Savannah?

A. I don't remember even that.

Q. How many years ago was it you were up there?

A. 15.

The Commissioner: About 25 miles?

The Witness: I don't think it is as much as that from where you go into the river proper.

Q. In the question that Mr. Haight put to you, your answer was about the propriety of sending this ship out

with the tugs and the rudder lashed amidships, your answer was predicated upon the assumption that the rudder was [fol. 501] straight, I think you have told us?

A. Yes.

Q. If the rudder was bent to starboard, let us say 15 degrees your answer would not be the same, would it?

A. If that—yes, with the rudder in any direction.

Q. It wouldn't be the same as to the propriety of sending a ship out with a rudder lashed amidships?

A. It shouldn't be lashed amidships then, it should be lashed in position so that the whole effect of the rudder would be neutral with the ship going ahead.

Q. That could only be an estimate of where to put it?

A. Yes, but it could be close enough for all practical purposes and could be demonstrated—in fact the rudder need not be lashed until the ship got to sea, the only object in lashing it would be to keep it from banging around. If left free, with the ship going down the river, it would not exert any effect whatever on her.

Q. If the rudder is lashed amidships and the bottom of the blade is twisted 15 degrees to starboard, you would not consider that proper condition to send a ship down even with tugs, would you?

A. No.

Q. Suppose it was 10 degrees?

A. It would be questionable, it is a matter of degree of course.

Q. You have told us, I think, about if 5 degrees could be taken care of——

A. Yes, from that fourth arm down with a maximum of 5 degrees, I don't think you would have—that it would prevent the ship from being under command, particularly at low speed.

Q. It would be very important and valuable to know that there was such a bend, would it not?

A. Yes.

[fol. 502] Q. So that you would know what to expect?

A. Yes.

Q. Even a 5 degree bend on there would affect the ship some?

A. Yes.

Q. If I understand, you think 15 degrees would be dangerous?

A. Yes.

Q. 10 degrees, I gather you think somewhat on the border line?

A. Yes.

Q. 5 degrees you think can be taken care of?

A. Yes.

Q. But you agree with me that the pilot should know it is 5 degrees for it to be prudent for the ship to go out, isn't that true?

A. Yes, he should ascertain that the rudder was reasonably straight or turn it loose, not go and tie it up with a bend in it.

Q. These other cases you mentioned here, the "Lexington" and others where you mentioned being in narrow waters, I suppose you meant short distances necessary to a particular reef?

A. Yes.

Q. It wasn't continuous towage?

A. No.

Q. In term of miles, that is what you have in mind?

A. Yes.

Q. Do you think that examination of 3 to 4 feet of the bottom part of the rudder by putting a boat hook or sticks down under water would particularly assist in ascertaining whether there was a slight bend in the bottom of the rudder?

A. I think so, if it was carefully done.

Q. Assuming that it was started in the middle of the rudder and was more or less on a continuous plane down to the bottom?

A. No. I think you could find it out by using battens and that. You would have a draft of 23 feet, say about 12 feet of the—what do you consider wour central point?

[fol. 503] By the Commissioner:

Q. What Mr. Longley is getting at, they took water down so about 3 feet of the rudder was under water, about 12 or 13 feet out of the water?

A. Then it could be down to here (indicating the fourth arm marked with a cross on Exhibit 6).

By Mr. Longley:

Q. The lower part is under water?

A. If they put a straight eldge down on either side it would show conclusively if the rudder had a substantial bend in if 6 inches out of line—3 inches, a straight edge would show it.

Q. A straight edge the whole length of the rudder?

A. Yes.

Q. That would require a straight edge 15 or 16 feet long?

A. Yes.

Q. If that wasn't done, you couldn't tell anything?

A. No, you would need a straight edge twice the length, something to carry up to your next arm.

Mr. Haight: To the middle arm?

The Witness: Yes, from there down.

Q. And as the bottom is under water, I assume that you would have to give it pretty careful attention to find this bend, wouldn't you?

A. I think any ordinarily competent engineer or surveyor could do that.

Q. If you have any breeze or wind on the port side on the bow of your ship and you have a drag aft of 5 feet that Mr. Haight mentions, is it not true that it is inclined to have a serious effect on the movability of your ship?

[fol. 504] A. Well, you have to be specific about that, I mean if you had a boat drawing say nothing forward and 5 feet aft, of course the wind would blow her right off.

Q. Well, in this case she was drawing 18 feet forward?

A. 18 and 23?

Q. Yes, approximately.

A. No, the wind would not blow her off if she had way on her, say from 4 knots up she would go into the wind, that is the effect of wind when you are towing a ship unless they are very light, you know, a big balloon to make sail 10 or 12 or 13 feet by the stern, they always eat into the wind, you have to drag them off all the time.

Q. You said that at high speeds you think the ship would be much better navigated with her own rudder?

A. Yes.

Q. But at low speeds you think the tugs would be better?

A. Yes.

Q. That is I assume because with low speeds you would not have steerageway, that is what you mean, isn't it?

A. Yes.

Q. When you say low speeds, you mean such speeds as the testimony here has brought to your attention. Have you read the testimony?

A. No, I haven't, but Mr. Haight told me the maximum speed was about 6 knots—8 kilometers, was it?

Mr. Haight: 8 kilometers through the water, 5 over the ground and a few kilometer- current against the ship.

A. (Continuing.) Speed through the water of course is what would count. I think that is perhaps the point where the tugs would be as efficient as the engine, say somewhere between 5 and 7 knots. Above that there is no question [fol. 505] that the rudder would be more efficient and the tugs less. I say 7 knots would be the dividing line.

Q. Below 5 you would consider the tugs were better?

A. Yes.

Q. Between 5 and 7 they are about equal, is that what you have in mind?

A. Yes, that is my opinion.

Mr. Haight: Knots?

Mr. Longley: Yes.

Q. There is no particular reason that you can see, is there, Captain, from this chart why the ship should be stopped up here above the Lesum River when they see this ship coming up?

A. Well, I haven't local knowledge. Mr. Haight told me that the current split going up the Lesum.

Q. Yes.

A. If that is the case, I should think it would be a good idea to pass at some other point where the current was regular, but in the basin I should think they should have slowed down on account of the better control, they should have slowed down say to below 5 knots, at least that is the way I would do it.

Q. If they had in fact passed the other ship before coming down to the Lesum, then your first reason goes by the board?

A. Goes by the board, the only reason would be better control at lower speed with the tugs.

By the Commissioner:

Q. If they were going at slow speed, say less than 5 knots

through the water, Captain Davis, could they safely go very close to the right-hand bank of the channel?

A. I don't know any reason why they couldn't.

[fol. 506] Q. Would it be hazardous to go very close to the right bank of the channel if they were going fast, say 8 knots?

A. Yes—I think the slower the speed the better control they would have and the safer it would be—I take it there wasn't a gale of wind blowing.

Mr. Haight: No.

A. (Continuing:) If it was moderate weather the ship would not make much leeway—I should think the slower speed they were making the closer they could go, but a speed of 2 knots they should be able to go within just a few feet of any object, because they would have such perfect control at very slow speeds.

By Mr. Longley:

Q. Is it not true, Captain, that in the daytime you can see whether your ship is sheering or going over one side or the other much more rapidly than at nighttime?

A. You can do all kinds of piloting and handling of a ship and all that better in the daytime than you can at night.

Q. Don't you think, Captain, that in a ship which has her rudder lashed amidships, when the lower part of the rudder has not in fact been actually seen, that it would have been a much more prudent thing to have this ship sail in the daytime rather than in the nighttime?

A. Well, I don't know the conditions well enough to answer that question. I don't think the rudder not having been seen if it was examined would make it any different, I know if I had examined it, or one of my men had by battens, I would feel just as sure it was practically all right as if I [fol. 507] had seen it. That wouldn't influence my decision at all. I don't know enough about local conditions to know whether it was prudent to tow at night.

Q. Well, when I tell you that the channel was only 300 feet wide and there were sharp bends in the river and those in position to know about it have said it is a very difficult river to navigate even in the best conditions?

A. Well, I should think then I would as readily take that ship with those tugs at night as I would with her rudder at night, but of course it would be better in the daytime under any conditions.

Q. Would it have been a much better thing to take the rudder out and sail without any rudder whatever?

A. If the rudder had been left free going down the river it would not make the slightest difference whether the rudder was there or not, just follow the line of flow of the water.

Q. That in your opinion would have been a much better thing to do than lashing it?

A. If I was taking the boat—you should be able to find out first after you have gone a quarter of a mile whether you have something wrong, if there is a bend in the rudder, by the action of your ship, but the examination having been made, I think it was all right to lash the rudder, but if no examination had been made with a loaded ship, and it wasn't sure whether the rudder was bent below or not, I would have left it free, it would not have the slightest effect on the ship, and then secured it when we got into rough weather.

Q. Then again answering with reference to battens testing the rudder, you mean a straight edge?

A. A straight edge, an ordinary straight piece of wood.

Q. You meant putting it against the side of the rudder above the middle part of it?

A. Yes.

[fol. 508] Q. It is perfectly feasible, is it not, Captain, to have taken this rudder out of the ship as soon as the water was reduced to below the lock pintle?

A. Yes, I think so.

Q. That is a very simple operation, isn't it—taking it out?

A. Yes, the modern rudder is simple enough.

Redirect examination.

By Mr. Haight:

Q. Captain Davis, the decision to tow the "Isis" having been arrived at, the representative of the Hamburg Line called up the chief pilot in Bremen and asked him when he wanted to send the ship down the river. The chief

pilot said "I would rather take her at night, there will be less traffic in the river and I consider it better, when the tide starts up we will start the ship down." The chart shows that the Weser at the upper part had a light every few hundred yards on both sides. The night was a bright moonlight night, they said you could see the banks of the river on both sides. Would you consider that there was any negligence in starting the boat down on the advice of the head pilot, under those conditions?

Mr. Longley: I object to the question on the ground mentioned heretofore, that I don't think the measure of negligence is to be measured by the opinion of some pilot.

Overruled.

A. Well, the chief pilot knowing local conditions should be the best judge of what was the proper time.

Q. When you say that it is better by day than by night ordinarily, does that mean that it isn't proper to go by night?

[fol. 509] A. I can answer that question, when I was a small boy there used to be a catch question, what is the best light in the English Channel, and the fellow that answered "daylight" was the one that won—we are all sailors where I come from—you know that no artificial light or even moonlight is as good for judging distance as daylight.

Q. But do you consider it improper to run a ship at night because daylight is better than moonlight?

A. No, boats go through Cape Code Canal, which is about the same as this river except it is a little narrower and straighter than this river, they go through all times of day and night, tows go through all times of day and night. The question I was asked was which was the better time, that is the way I understood it.

Q. You didn't mean that it wasn't proper to go at night ever?

A. No.

Q. But that daylight is better than moonlight?

A. Yes.

Q. Now if the "Isis" starting out up here at Bremen proceeds for a matter of 10 or 12 or more kilometers without the slightest indication that there is anything wrong with the rudder, do you think that there could have been

such a bend in the rudder as to affect the steering of the boat at all?

A. No, I think they should have discovered it before they had gone that distance.

Q. I understood you to say that they should be able to find out whether or not their rudder was all right before they had run more than half a mile?

A. As soon as they had the speed on the ship they were going to navigate at.

Q. Just as soon as the tug started out full speed down the river and they got their boat going through the water at 7 or 8 kilometers an hour, they would then know, would [fol. 510] they not, if there was anything wrong with the rudder?

A. Absolutely.

Q. You couldn't run the boat half a mile at normal towing speed with something radically wrong with the rudder and not find it out, could you?

A. No.

Mr. Longley: I prefer to have you lead not quite so grossly.

Q. Captain Davis, here is an enlargement of the chart from Bremen down to the juncture of the Lesum. The testimony is that when the vessel was above the 17th kilometer they saw another ship coming around, bound up, that the pilot continued without slacking his speed at all, that he passed the upbound ship in the vicinity of the 17th kilometer, that to do so he had to swing his vessel over to starboard, and after getting by the ship, the current striking him on his port bow carried him broadside up against the bank so that the starboard tug had to let go. As he came down, the buoy near the point of land between the Lesum and the Weser was up against his starboard side, and being afraid of fouling his starboard propeller in the chain, he stopped his starboard engine, with his starboard tug gone and his starboard engine stopped, his bow is caught by the current that starts up the Lesum. The one tug ahead is unable to hold him and his bow swings around and fetches up on the docks on the opposite side of the river, and he is washed up against the point of land. What do you say as to the navigation of the "Isis" was it in your judgment prudent and careful or otherwise?

A. I think they should have slowed down—that might [fol. 511] be expressing it a little too strongly—after an accident it is easy to point out improvements, perhaps that is too strong a word, it was an error in judgment.

Recross-examination.

By Mr. Longley:

Q. What was the error of judgment, Captain?

A. Well, they got into trouble and it certainly could have been avoided, because going slowly—or in my opinion it could have been avoided—going slow they would have perfect control of their ship, they wouldn't have had to get into such a position unless the other fellow crowded them, but they had 150 feet of channel, they should have been able to take care of their ship all right.

Q. Are you assuming that these two ships passed at the mouth of the Lesum?

A. No, they passed at kilometer 17.

Q. The testimony here is that, Captain, just as soon as this ship passed the kilometer 17, they immediately made efforts to get back into the middle of the channel and couldn't do so. Now where is the negligence there?

A. Well, they got out of the channel at too high a speed apparently.

Q. Well, what do you assume—what are you assuming was the reason why they couldn't get back into the center of the channel?

A. They wouldn't have control of the ship.

Q. This is above?

A. For instance the lines on the tugs at high speed would stretch out under a big helm and all that sort of thing, that is the reason they don't have control, if you could make your tugs fast readily, for instance if the tugs' bitts, the stem heads and everything was solid enough, if there was we will say, eyebolts or staples in the ship's side so lines wouldn't have to lead right up, you could tie them up [fol. 512] strong enough so you could get speed up under conditions you have to meet, you can't get lines tight enough to make them immovable and have speed, you put such strains there that the boats' lines slack up, she sheers around too much, the boat herself is the rudder, instead of her rudder acting on the whole structure.

Q. What speed are you assuming?

A. I was told a speed of 8 kilometers.

Q. Is that extraordinary speed, Captain?

A. It is just the margin—for safe tugboat operation—between safety and danger, I should say.

Q. Captain, you see there is no evidence here that there was any current hitting the bow of the ship until they got down to the Lesum, and I state to you that the evidence here shows that at kilometer 17 they couldn't get her from her sheer to starboard back into the mid-line of the channel, what do you assume is causing her to hold that sheer so it cannot be broken?

A. Well, if the bow line on the tugboat on the port side—if they had starboard helm on that tugboat on the port side her bow line stretching so that the axis of that tug—the fore and aft line of that tug—instead of being inclined to the axis of the ship, the center line—was inclined away from it. Instead of the tug's rudder controlling the operation and shifting the stern of that ship to starboard, the bow going to port, the tug herself would get across and be the rudder—that would shoot the other way, just like a port rudder.

Q. What about your starboard tug?

A. The starboard tug, if her line stretched to such an extent that she can shove around too much, she also would be a port rudder.

[fol. 513] Mr. Haight: The starboard tug had gone.

Mr. Longley: Not at this point.

Q. What about your port and starboard engines?

A. I know, but you can't expect a ship with a little sheer on—the port and starboard engines would help, possibly all these things didn't happen, but any one of them happening would—I don't think the stern line on the starboard tug would be apt to stretch so much, they have more room, they can take it out to the far side of the tug, but that port tug, if her bow lines stretched too much so that she kind of—she would become a port rudder instead of a starboard rudder.

Q. They could change the helm, couldn't they?

A. Yes, but if they changed the tug's helm—the only thing they could do would be back. If they put the helm over they would be—the point is at high speed those things

will happen, lines will stretch and strains will set up that are not set up at low speed.

Q. I want to ask you two questions about the navigation down the river up to this point. Are we to understand that you feel that any difficulty with the rudder is bound to be developed at that point when you are steering the ship with two engines and with towboats—three towboats, or particularly with two at the port and starboard of the ship?

A. Well, you say bound to be developed—you mean bound to be discovered?

Q. Yes.

A. Well, if the people were alert, I know of no reason why it would not be.

Q. It depends upon if they just keep their ship straight by use of the facilities they had?

A. Yes, but if the rudder—the wheel was bent so it had the effect of a port helm, they would soon notice that they had to maneuver against the port helm and discover that [fol. 514] something would be wrong.

Q. If they were alert, you mean?

A. Yes.

Q. But you must assume very careful attention to the navigation of the ship, that is so, must you not?

A. Not ordinarily—an alert man should notice that there is something wrong there when the ship wasn't acting normally, that he had to put more rudder—when I say rudder, wheel to the tugboats or engines—more steering effect on one side than the other.

Q. Well, you see I gather from your opinion that you do not consider that those in charge of this ship were ordinarily attentive to their duties, isn't that so?

A. I said that an accident never happens without an error in judgment on somebody's part, there has been an accident and you have to assume there was error in judgment, I say that negligence or lack of prudence would be too strong a word.

Q. Can you not conceive of circumstances under which a ship is called upon to make a pronounced turn to port and it becomes very difficult to turn to port because of the condition of her rudder which has not theretofore shown itself?

A. Well, such a thing might be possible but I shouldn't think it would be probable. If the speed was increasing and she was going faster than she had ever gone before, why it would have an effect that it hadn't had before if they had speeded up to pass this ship.

Q. Or if she was going faster through the water?

A. Yes.

Q. What I am getting at, you say navigation around slight bends doesn't necessarily mean that the ship is going to be able successfully to navigate around a pronounced bend and does not necessarily establish that her rudder is [fol. 515] in absolute prime condition, does it?

A. I should think a straightaway would be the place where you would notice your wheel—rudder—off amidships.

Q. If the master was alert, as this man apparently was not, is that what you have in mind?

A. I didn't say that he wasn't—you are putting words in my mouth now "apparently he was not".

Mr. Longley: I won't ask you to answer it, Captain, that is all.

By the Commissioner:

Q. What is the effect of a steamer going down a river such as this getting too close to the bank at the edge of the channel?

A. Well, to use a sailor's phrase, she smells the bank and goes right for it.

Q. Well, at a speed of—I think you have testified that at a speed say 2 or 3 knots she could go within a very few feet without that effect?

A. Yes, the faster the speed the more suction.

Q. Now at a speed of say 8 kilometers, how close do you think she could safely go without running the risk of smelling the bank?

A. That would simply be a guess 30 feet—you would have to get one of the stream line experts to answer that question, it would depend upon the shape of the ship, the depth of water under her, all factors I am not competent to answer for.

Q. But if you were in charge of the operation, you would begin to get nervous at 30 feet?

A. Yes—well, she would have to be further away than that, with a tug alongside of her—yes, I would get nervous at 30 feet—at more than 30 feet I wouldn't run at any such speed as where I had to go within any such distance as that [fol. 516] of a bank, whether the ship had a propeller or whether the ship had tugs.

Adjourned until 9:30 A. M., December 23rd, 1930.

December 23rd, 1930.

Met pursuant to adjournment.
Present: As before.

ANTHONY HUSBY, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Haight:

Q. Captain Husby, how long have you been going to sea?
A. Since about 14 years old.
Q. How many years does that mean?
A. Around 30 years, I am 47.
Q. What license do you hold?
A. Master, unlimited.
Q. How long have you held a master's license?
A. Since about 1915.
Q. With what company did you start?
A. I started my early days with Moran.
Q. Moran Towing Company?
A. Moran Towing Company.
Q. What year did you go with them?
A. About 1907.
Q. How long did you remain in that employ?
A. I guess along about five or six or seven years, something like that.
Q. While you were in the employ of the Moran Towing [fol. 517] Company, what was your work?
A. Deckhand on a tug.
Q. What kind of work was your tug doing—harbor or coastwise or what?
A. Everything around, coastwise, harbor—general towing.

Q. Now the work done outside of New York harbor was between what ports?

A. Mostly Boston, New York, Philadelphia and Norfolk.

Q. What kind of boats were you towing?

A. Sometimes sailing vessels, barges, anything of that sort that we may get orders for.

Q. Now after leaving the employ of the Moran Towing Company, what company did you join?

A. I went with Barrett.

Q. In what capacity were you with Barrett?

A. I went there as on deck, as a deckhand.

Q. When did you take charge of boats as mate and captain?

A. When I got my license in 1914, I was extra captain and mate.

Q. And with the Barrett Towing Company, where was your work chiefly?

A. I was with Shewan's drydock during the war.

Q. With Barrett, was that work in port or coastwise?

A. In port altogether.

Q. How long were you with Barrett, until what year?

A. Until about 1916.

Q. In 1916 with whom did you go?

A. The Shewan Drydock Company.

Q. How long did you remain with the Shewan Drydock Company?

A. Till 1921.

Q. And with Shewan what work were you in charge of?

A. During the war I was in charge of all the yard work, transporting ships, putting them in place, taking them from pier to pier or from stream to dock, whatever was necessary to be done.

Q. Shewan's is a repair yard?

A. Yes.

[fol. 518] Q. While with Shewan's during that five or six years, were you handling damaged vessels?

A. Handling vessels with steam and transporting ships wherever I got orders to take them.

Q. That was your entire work?

A. Yes.

Q. Were you the man who was in charge of handling those boats under repairs?

A. Yes, sir.

Q. In and out of the yard?
A. Yes, sir.
Q. Since 1922, what work have you done?
A. The Moran Towing Company.
Q. Are you still with the Moran Towing Company?
A. Yes, sir.
Q. In what capacity?
A. Port captain.
Q. How long have you been port captain?
A. Five years.
Q. Since 1925?
A. Yes.
Q. As port captain for the Moran Towing Company, what are your duties?
A. I go out on every job we have that I can fill. I do most of that, whatever I can do, we have two other men to do all the jobs that come in, if I can do them I always do.
Q. What kind of jobs does the Moran Towing Company handle?
A. Docking and undocking of vessels.
Q. Do you tow vessels to drydock?
A. Transport ships to drydock, from piers to piers and from the drydock with steam and without steam.
Q. Do you do the work of shifting vessels from one dock to another?
A. Yes, sir.
Q. Much of it?
A. Quite a number of jobs, yes, sir.
Q. Are those vessels frequently shifted without steam?
A. All depends on the ship, whether she has repairs or not, if she has repairs and we can't have any steam, then we have to tow them.
Q. What Lines does the Moran act for in the matter of [fol. 519] docking and undocking and shifting their boats?
A. We have the Hamburg-American Line work, American Republic Lines, Ore Steamship Company, United States Army Transport, Lloyd Brasileiro, American Hawaiian Line, part of the Norton Lilly, and we do the American Sugar and we used to do the Roosevelt, we don't do that now, and various other companies.
Q. How about the Texas Oil Company?
A. The Texas Oil Company, Petroleum Navigation and part of the Shipping Board.

Q. In the course of your handling the boats of the Ore Steamship Company, have you had occasion to tow them in and out of Claremont?

A. When they go in we don't tow them, they use their own power.

Q. When they come out, how do you handle them?

A. Use the same kind of towboats that we have going in, but we can't turn around in there, we take them out stern first—we can now, but for two or three years we couldn't, but they dug a basin so they can turn around there now.

Q. How big are the ships of the Ore Steamship Company?

A. I believe they carry around 20,000 or 22,000 tons of ore.

Q. They are so long they can't be turned in that channel?

A. They can now, but for two or three years they couldn't.

Q. There is a turning basin now?

A. Yes.

Q. About how wide is that channel?

A. About 200 feet—probably 300.

Q. So narrow that a ship is longer than the channel is wide?

A. Yes.

Q. When you get an ordinary Ore Steamship Company's vessel how do you handle her getting out—or how did you before they could turn there?

A. Put a boat on a hawser on the stern and pull up the [fol. 520] channel, and if we came out on the flood tide we as a rule put two tugs on the stern quarter to hold the stern up against the tide and one on the bow to keep the bow straight, the bow would be trailing behind—the tug trailing right on the bow to keep the steamer's bow straight.

Q. On the flood tide would you have a cross current going right across the channel?

A. Yes, sir, right across the channel.

Q. Were you able to control as big a ship as that without difficulty?

A. Yes.

Q. How did you set your rudder when you towed them out stern first?

A. It wouldn't be much use.

Q. But how would it be set, amidships or——

A. Amidships you may have the rudder hard over one way or the other, but if she happened to take a run into a bank it would bust the rudder, so we always avoid it, leave the rudder amidships, there is no chance of damaging the rudder if you leave it amidships, if you put it on the bank, breaking it off.

Q. With the rudder set amidships and towing vessels stern first, do you have any difficulty in controlling them?

A. No, under ordinary conditions, nice weather, we never had any trouble.

Q. Have you had occasion to tow ships without rudders?

A. Yes.

Q. Has that been a frequent occurrence while with Shewan?

A. Not frequently, but I have had a number of vessels towed that way, I can't name them it is so long ago, but I know we did.

Q. Have you towed vessels with no steam on, with the rudder amidships but no means for using the rudder?

A. Yes, that happens.

Q. Have you had a recent occasion to tow a vessel that [fol. 521] was dead, from Jones Point down to Shewan's yard?

A. I had one.

Q. You told me of one boat, the "Democracy"?

A. Yes.

Q. Please tell me the facts about her.

A. I don't remember the date exactly, but we went up to Jones Point and took her out of the fleet up there. We went up to the fleet, took her out with one tug, she lay down the west side of the fleet, of course on the outside, and we took her away with one tug, towed her down to New York with one tug and the rudder amidships.

Q. She was one of the Shipping Board boats tied up in the fleet off Jones Point?

A. Yes, sir.

Q. And she had no steam on her?

A. No, sir, she had been laid up there six or seven years, about, I guess.

Q. About how long a boat was she?

A. I would say about 340—350 feet.

Q. The "Democracy," built 1917, 377 feet long, 52 beam, 28.6 depth of hold, belonging to the United States Shipping Board, that is the vessel, Captain?

A. That is the vessel.

Q. How many tugs did you have towing her down from Jones Point to the Battery?

A. One tug.

By the Commissioner:

Q. How many miles is that, approximately?

A. I guess about 40 or 42 miles—about that, I haven't measured it off, but about that.

By Mr. Haight:

Q. When you got to the Battery where did you put the "Democracy"—where did you take her?

[fol. 522] A. Took her into Shewan's drydock, foot of 27th Street, Brooklyn.

Q. From the Battery into Shewan's drydock, what assistance did you have?

A. Two more tugs.

Q. How wide a channel did you have going into Shewan's yard?

A. At the entrance it would probably be 800 or 900 feet, into the narrowest part of it probably about 300.

Q. Where did you have the three tugs made fast when you took the boat through the entrance and into Shewan's dock?

A. One on each side made fast aft and one tug ahead.

Q. With the three tugs so made fast, did you have any difficulty in handling the boat?

A. No.

Mr. Longley: I suppose all this is subject to my objection, it is irrelevant what this man did with some other flotilla.

Mr. Haight: I happen to have some experts who have done some towing, your fellows were all engineers.

Mr. Longley: I think the question is irrelevant.

The Commissioner: I will let it go in.

Q. The "Democracy" had no steam on her at all?

A. No, sir.

Q. Have you towed many other ships without steam on them?

A. As I said before, when we have a transport job to do if a ship has steam, if she has any propelling power we use it, if she has no steam on her we tow them.

Q. While you were with Shawan and since, did you frequently have occasion to tow vessels that haven't any steam?

A. Yes.

Q. When you do so, how do you set the rudder of those ships?

A. If you can't use the rudder it is left amidships, that [fol. 523] is the way we leave it, it is the only thing to do, leave it amidships.

Q. You have testified that you handled United States transports, where are they towed from and where to?

A. From Pier 2 Army Base, sometimes go up to Morse's drydock about three or four piers away, other times they go to the Navy Yard, that is going up the East River.

Q. How large vessels have you handled for the United States Army their transports?

A. I guess the biggest transport they got, the "Chateau Thierry" is about the largest one they have now.

Q. Have you handled them with no steam on them?

A. Yes, sir.

Q. Have you had occasion to tow vessels with twin screws where they did have steam?

A. I did at one time, yes.

Q. Have you ever had a case where the rudder of a twin screw boat was out of commission but her engines were going?

A. Yes, sir.

Q. What case was that?

A. About four years ago I had the "San Jeronimo" belonging to the New York Engineering Company from Staten Island up to Clinton Street.

Q. Were her twin screws used to help steer her?

A. Yes.

Q. How did they work?

Mr. Longley: Objected to.

The Commissioner: Sustained.

Q. Were they effective?

A. Absolutely.

Mr. Longley: I move to strike it out as irrelevant, the whole thing is so irrelevant I submit we are just wasting time here.

[fol. 524] Mr. Haight: I think it is rather useful to hear a man who knows how these things work.

Motion denied.

Q. In handling that particular boat, how many tugs did you use?

A. Two tugs.

Q. Did you have any difficulty in handling her?

Mr. Longley: Objected to as irrelevant.

Overruled.

A. No.

Q. Now the steamship "Isis," according to Lloyd's Register was 376.2 feet long, 51.8 beam, 25.9 depth of hold, she was also 28 feet 3¾ inches molded depth. She was a twin screw motorship, her engines developing 2400 horsepower, each engine 1200. On the occasion involved in this particular suit, the rudder stock of the "Isis" had been twisted and her rudder which otherwise was undamaged was lashed amidships; her engines were in perfect running order, she was drawing 18 feet 5 inches forward and 23 feet 5 inches aft; she had a tug forward of 1080 horsepower on a hawser of 30 to 35 meters say 100 feet she had two tugs made fast opposite No. 4 hatch, the one on the port side had 800 horsepower, the one on the starboard side 810 horsepower. On a clear night with the moon shining she started down the Weser River from Bremen about an hour and a half after the tide had started on the flood. Throughout her navigation she had the current running against her at the rate of about 3 kilometers per hour. The channel of the Weser River is not less than 300 feet wide. Will you please state whether or not from your experience the "Isis" [fol. 525] under the conditions named had adequate steering capacity to navigate in any water that a vessel would ordinarily navigate under her own steam with her rudder in full working order and with no tugs?

Mr. Longley: Objected to on the ground that the premises given are not supported by the evidence; on the further

ground that this witness is not qualified to express an opinion in the matter.

The Commissioner: Nothing wrong with the facts except that same point——

Mr. Longley: That is all I have in mind now.

The Commissioner: I think if you are not satisfied with the witness' qualifications you should have opportunity to examine him on his qualifications.

Mr. Longley: I don't want to break up the examination.

The Commissioner: I will overrule the objection, it being understood that you may cross examine later as to his qualifications and that any cross examination will be without prejudice to your objection.

A. In the first place, to go back to your power that you have on your tugs, that almost equals, if not more than the ship's power.

Q. It is more than the ship's power?

A. Then about the same power the three tugs will equal about the same power as the ship, or more. In my opinion the way we do work here in New York, that is more power than we ever would have on a ship of that size, regardless of where she may go. Besides that, you have a twin screw ship and the two propellers working can be used, if you [fol. 526] want to use them. I would say that you were in a better position and better shape to go up that river with your own ship's power, a twin screw ship and three tugs than with the ship alone going up.

Q. Or going down?

A. Absolutely.

Q. When you have a boat no bigger than the "Isis", 376 feet long and three tugs made fast as I have suggested, would you have more control with your tugs than you would have if the vessel were going under her own steam with her rudder intact and her engines in order, assuming particularly slow navigation in a narrow channel?

Mr. Longley: Of course this is all subject to my cross examination on qualifications.

The Commissioner: Yes.

A. If we handle a ship in a narrow channel of that kind, as the "Isis" was in, we always keep one tug on each side made fast and that acts like a twin screw, and we have the

leading towboat on a hawser to go ahead, that is the way we go, and you can use them two tugs as a twin screw, you can come home on one with the wheel hard over and back on the other one, that acts just like the ship would have her own power, about the same. If you have powerful tugs, which the "Isis" had at that time, I couldn't see that it would make any difference.

By the Commissioner:

Q I think what Mr. Haight is trying to get is this—in answer to his question you said that a ship going up or down the river with three tugs as described would be better off [fol. 527] than she would be without the tugs, but what Mr. Haight wants to get at is whether she would be better off with the tugs and her rudder out of commission or with the tugs and her rudder in commission?

A. I would say going down the river where you have plenty of room where you can speed up and keep your speed I would say no, you would have better control with her own power and rudder, but going up a creek or a small narrow channel where you had to maneuver slow, I would say the tugs would handle her better.

Q. Even without a rudder?

A. Yes, but where you have plenty of room I would say that the ship's propeller and own steam would be better.

By Mr. Haight:

Q. Provided you were going full speed?

A. Yes, or half speed—a good rate of speed.

Q. Good speed ahead?

A. Yes.

Q. When you are navigating a narrow channel, a channel frequented by other ships where you may have to slow down and turn out to the side and bring your vessel down to 3 or 4 knots, which do you think would give you better control of the ship, twin screws, rudder lashed and three tugs as I have described, or the rudder in commission and the ship's steam only?

A. Well, all that together give me better power, better help than a ship with her own steam.

Q. When you have to handle a vessel that is still or very nearly still, tugs are very much more useful than her own steam, are they not?

A. Absolutely.

Q. With three tugs made fast as described and a current setting up river of about 3 kilometers—say 2 knots—would [fol. 528] there be any difficulty in stopping the ship dead over the ground and holding in position with those tugs while another ship went by?

A. Absolutely not, I can't see it.

Q. You could hold her there indefinitely if you wanted, couldn't you?

A. Absolutely.

Q. Now have you towed ships through all of the narrow channels in the vicinity of New York?

A. The most narrow channel we have is Staten Island Sound or the Kill van Kull, Newark Bay, going up to Hackensack or Port Newark, that is the most narrow channel we navigate in.

By the Commissioner:

Q. How about Newtown Creek?

A. Of course we get one up there once a week, but where we frequently navigate is the others.

By Mr. Haight:

Q. Name, please, the narrow channels in New York and about New York harbor.

A. The narrow channels would be Newtown Creek, a long narrow channel, just probably sometimes 100 feet to navigate in, 150 feet, 200 or 300 feet.

Q. Have you towed vessels into Newtown Creek?

A. Yes, sir.

Q. Often?

A. Not often, I guess in my experience I must have had three or four up there.

Q. How about Black Tom?

A. Black Tom, not so frequently, no.

Q. Have you towed into Black Tom and out?

A. Yes, sir.

Q. The channel into Claremont?

A. Yes, sir.

Q. How often have you been in and out of there?

A. Three or four trips a month the last four or five years, [fol. 529] ever since I have been running in there.

Q. The Kill van Kull?

A. The Kill van Kull, every day.

Q. How narrow is that channel in its narrowest spot?

A. When completed it is supposed to be 400 feet, it isn't completed.

Q. What is it now?

A. The narrowest point we have got at Bergen Point, 200 feet.

Q. Now how wide is Gowanus Canal?

A. Gowanus Canal, not so wide, sometimes just room enough to get a ship in, have to let the tugs go one behind, one go ahead to drag her in.

Q. Have you handled ships in and out of Gowanus Canal?

A. Yes, sir.

Q. How about the Hackensack River in Newark?

A. Not Newark, up to Port Newark for the Transmarine Company.

Q. Have you been in and out of the Hackensack River frequently?

A. Yes, sir.

Q. How wide is the channel?

A. Not so wide, supposed to 400 feet in places, but there is places where it is very narrow. The Cahill Towing Company have colliers going up there to what they call West End, the channels there is very narrow, they got to go through four or five bridges, just about room enough to put the ship through. They have to let the tugs go from the ship to get the ship through the bridges up there.

Q. Have you recently had occasion to tow a large steamer up to Carteret?

A. I had one last week.

Q. What was her name?

A. That was the "Papoose".

Mr. Haight: According to Lloyd's record she is 412 feet long, 53.3 beam, 31 feet depth of hold.

[fol. 530] Q. Towing her to Carteret you took her through the Kill van Kull?

A. Yes, sir.

Q. And Staten Island Sound?

A. Yes.

Q. How narrow a channel did you put her through before you got to Carteret?

A. Just the channel that I have described a little while before, the channel is supposed to be 400 feet when it is completed, and there is different places not completed, it is only about 200.

Q. How many tugs did you have to handle her?

A. Four tugs.

Q. How did you have them made fast?

A. I had one ahead to lead, one on each quarter made fast aft and I had one hanging on the port bow.

Q. Was she single screw or twin screw?

A. Didn't have no propeller.

Q. No propeller at all?

A. No.

Q. What was wrong with her?

A. Broken shaft.

Q. What time did you start your towage?

A. I guess I started from Staten Island around 3 o'clock in the afternoon.

Q. What time did you reach Carteret?

A. 6 o'clock.

Q. How much of that time were you running in the dark?

A. I guess around 5 o'clock.

Q. About 5 o'clock it was dark—from 5 to 6 it was dark?

A. Yes, sir.

Q. Now the last part of your towage, the last hour, was that through the widest or narrowest part of the channel?

A. The narrowest, just room enough to go through that bridge, we went through there in the dark.

Q. How wide are the bridge piers?

Mr. Longley: Objected to as irrelevant. I object to any further examination along this line or what this witness did [fol. 531] with some particular ships, whether or not he put them through some narrow waters and didn't have any accident.

The Commissioner: I will overrule the objection. I think Mr. Haight is entitled to qualify his witness liberally.

A. The channel between the spans—when you say the bridge piers, you mean the space to go through?

Q. I don't know the bridge myself, are there two piers on which the bridge rests at the narrowest spot in the channel?

A. All depends what bridge it is, sometimes it is a swinging bridge with an abutment in the middle, swing them, it leaves two draws open, that particular draw that we did go through at this time is probably about, I say at the most 200 feet wide, the ship is probably 52 feet wide and the tugs about 21, so you just had room to go through, I would say 175 feet.

Q. Did you have any difficulty in navigating the "Papoose" in the dark?

A. No.

Q. Through the bridge and through the narrow channel?

A. No, sir.

Q. Are you doing that kind of work regularly, Captain?

A. General work every day.

Q. Will you please look at the chart of the Weser River, Exhibit 9. The "Isis" with the three tugs made fast as described left the basin at the point marked X in a circle and came down the channel into the sea, reaching a point opposite the Vegesack at the junction of the Lesum, are you at all familiar with the Weser River?

A. No, sir, I am not.

Q. Judging from the map as shown, and with the statement that the channel is not less than 300 feet wide, should there in your judgment have been any difficulty in handling the "Isis" under the conditions described down a river of [fol. 532] that contour?

A. In my opinion I can't see why they should have any trouble unless it was blowing a great big gale of wind.

Q. No, in ordinary weather conditions with the moon shining?

A. No.

Q. Now the towage of the "Isis" down the river was undertaken at about 1.30 A. M. on a clear night with the moon shining. The river was lighted as you see from the chart, lights on both sides of the channel every few hundred yards. In your experience would you consider there was any impropriety in starting towage at night under the conditions described?

Mr. Longley: There is no evidence here that this witness except in one case towing between 5 and 6 o'clock ever towed at night. I object as not qualified to answer such a question.

Overruled.
Exception.

A. It is customary for us at any time if we take a tow, which we do lots of times, we start from New York to Boston or Boston to New York, you can't limit your time, you have to work in the dark, you can't make your own time, you have a certain distance to cover, you can't stop work because it gets dark, that is what we have lights for so we can see where we are going. You come from Boston bound for New York, you come down through the Gate keep on going outside, you can't stop because it is getting dark, you keep on coming just the same.

Q. Would there in your opinion be any difficulty in handling a ship on a clear night with the moon shining, [fol. 533] the banks visible, lights as shown in the chart, with the tugs and other conditions described?

A. With the conditions and help that he had, I can't see where he should have any trouble.

Cross-examination.

By Mr. Longley:

Q. Captain, what papers do you hold?

A. Master's and pilot unlimited, New York Bay and harbor.

Q. That is your license is limited to New York Bay?

A. Unlimited master, and pilot for New York Bay and harbor.

Q. Well now, what experience have you had commanding any seagoing ship?

A. The only experience I had of handling a seagoing ship is what I had here in New York harbor.

Q. You have never commanded a ship sailing outside of New York harbor?

A. No, sir.

Q. Were you ever mate of a ship sailing outside New York harbor?

A. No, sir.

Q. Did you ever serve on a ship in any capacity?

A. Quartermaster.

Q. You served as quartermaster?

A. Yes.

Q. How many years ago was that?

A. Away back in 1906—'05 and '06.

Q. Well, how did you happen to get your unlimited master's license, as you have never served in any capacity except quartermaster on a seagoing ship?

A. I can get that by having time off unlimited ships' tonnage, large vessels, I can get that as long as I have served on steamers large enough to give me the tonnage.

Q. When did you serve on steamers large enough, Captain?

A. In New York harbor.

[fol. 534] Q. You mean in just towing them back and forth?

A. Yes, sir.

Q. And based on your experience in towing steamers in New York harbor, you have secured an unlimited master's license?

A. Yes, sir.

Q. Well, in these towage operations where are you, on the bridge of the ship being towed?

A. Yes, sir.

Q. So that you can give orders to your tugs, I assume?

A. Yes, sir, you don't need no license for that, on board a dead ship, when you tow steamers you tow a steamer just as a barge, and you don't have to have anybody pilot that ship—of a dead ship.

Q. I understand that you don't have to have a license, Captain, but these ships that you tow sometimes on the bridge or perhaps usually on the bridge of the ship, very frequently are not under their own steam, you have told us that?

A. Most of the time they have their own steam.

Q. Sometimes not, that is true, isn't it?

A. That is right.

Q. How many years were you quartermaster of any seagoing ship?

A. About a couple of years.

Q. Prior to that, what were you?

A. Sailor.

Q. So your experience in connection with any seagoing ship is limited first to being a sailor before the mast and second a quartermaster for two years?

A. Yes.

Q. Subsequent to that time, your only experience has been while such ships are being towed in New York harbor?

A. Yes.

Q. These towage operations that you have testified to in answer to Mr. Haight's questions, in each of these operations were you on board the ship or on board one of the tugs?

A. On board the ship.

[fol. 535] Q. In each case?

A. Yes, sir.

Q. I mean these were all operations which you personally conducted, were they?

A. Yes, sir.

Q. Are we to assume that in each of these operations to which you refer, that you had no damage to your towed ship?

A. Not the jobs I have done, no so far.

Q. That is because I assume you have been very careful?

A. Well, naturally anybody would take all the precautions there is to be taken, when you navigate channels like that you can't go to bed, you have to be on the job.

Q. Quite so, it requires a good deal of care?

A. Absolutely.

Q. That is particularly so if your ship doesn't have the use of her own rudder, isn't that true?

A. That is right.

Q. And the care required and the danger presented increases as the narrowness of your channel increases?

A. That is right.

Q. So the most dangerous situation presented in a towage operation is to have a ship without steerage facilities to be towed through narrow waters, isn't that so?

A. Not necessarily, no.

Q. What is the most dangerous towage operation?

A. Any time, it doesn't make any difference in particular cases.

Q. I don't think you understood my question, Captain. What do you mean by any time—any towage operation is dangerous?

A. Absolutely.

Q. That is why you have to use so much care, because it is dangerous?

A. In a towing or transportation job you are up against danger all the time more or less, you don't know when anything is going to happen, there is chances all the time with a steamer in the port of New York or any other port when you are apt to do damage any time, there is a certain [fol. 536] amount of risk no matter what job you do, there is a certain amount of risk attached to it.

Q. We understand that, but is it not so that you have an even greater risk than you ordinarily have when you are towing a ship through narrow waters with her rudder inoperative—that is the most dangerous towage operation there is, isn't it?

A. That means with her rudder still, you can't use the rudder, is that it?

Q. That is it.

A. I wouldn't say, no, you get to narrow places and you operate or handle your ship with tugs, I would say you are just as well off with the ship with her own propeller power, you are better off.

Q. I haven't asked you that. I am assuming that you get all the tugs you wish, is it not so—I am not asking you to compare it with a ship with her rudder in good condition. I am asking you to tell me if it is not so that in towage of ships, the most dangerous situation presented is when you are towing your ship through narrow waters with an inoperative rudder?

A. I would say no, when you have sufficient help and power, the risk is not any more.

Q. Well then you would consider that there was no greater danger in towing a ship through narrow waters than you would in towing a ship out in the open sea?

A. No, with proper help there is no greater risk.

Q. What are you going to strand on out in the open sea?

A. You are not talking about the open ocean, you are talking about close creeks and narrow channels.

Q. I am asking you something else, Captain. Don't you agree that it is more dangerous to tow a ship through narrow waters than it is out in wide waters, in the open ocean? [fol. 537] A. I said with proper help I would say no.

Q. There is no difference in danger whatever?

A. Probably to a certain extent there is, but there is no more danger in towing a steamer with proper help through a narrow channel than to go through with her own power.

Q. By the same token, is it also your opinion that the rudder of a ship when being towed, if it can be operated, is any assistance whatever?

A. It will help, but if you haven't got it you will overcome that by using your tugs and using the help and power that you have.

Q. Then it does make it more difficult?

A. No, it don't, I wouldn't say that, no, we never found it that way.

Q. Well, don't you use the rudder if it is operative?

A. Sometimes we do, sometimes don't, if we handle a ship that hasn't got any steam, the rudder is put amidships, if the ship has no steam we can't use the rudder, we never ask a question.

Q. So it does not make any difference to you, you never ask whether a ship's steam is on or not?

A. No, sir, we don't.

Q. So you go on and proceed to tow your ship without any knowledge whether using steam or not?

A. No, sir, we don't. When we get orders from our office to tow a vessel they will say how many tugs do you want, one, three, two—how many do you want, this ship is dead, she has no steam, how many tugs do you want, we name the tugs, the help that we want. They say this ship is dead, we feel there is no steam on, that is all the questions asked on that, we go ahead and do the work, we never ask whether there is steam on the steering gear or winches [fol. 538] or boilers or anything.

Q. If you know a ship is dead you know there is no steam on the boilers?

A. That is it.

Q. Don't you make an examination of the steering gear of a ship when you start towing?

A. When we get a contract to tow a ship that we call dead, we have absolutely no reason to examine any steering gear on any ship or boat that we tow.

Q. You have never conducted a towing operation in the Weser River, have you?

A. No, sir.

Q. You have no knowledge of the river?

A. No, sir.

Q. You know nothing of the current in the river?

A. No, sir.

Q. Or of the bends in the river except as shown on the chart, or anything else?

A. No, sir, I don't.

Q. Your first experience in towing you have told us was being a deckhand on a tug?

A. Yes.

Q. You remained a deckhand from 1907 up to 1914, did you not?

A. Yes, sir.

Q. And it was in 1914 that you first got your extra captain's license?

A. Pilot license.

Q. Extra pilot's license, was it?

A. Pilot license, that is the first license.

Q. That was 1914?

A. Yes.

Q. Your experience with Shewan's is entirely, I take it, in connection with assisting or towing vessels?

A. That is right.

Q. What is the longest towing operation you ever conducted in narrow waters?

A. A steamer or any tow?

Q. Towage of a steamer?

A. Towage of a steamer, I had steamers from Perth Amboy to New York.

[fol. 539] Q. How long is that?

A. I guess about 18 miles.

Q. Is that the longest?

A. We had several steamers from Jones Point last year, I guess we towed down five or six, that is 40 or 42 miles.

Q. How wide is the channel in the Hudson River from Jones Point to the Battery?

A. It is pretty wide.

Q. How wide, a thousand feet?

A. I don't know, I never measured any point in the Hudson River, I don't know.

Q. It is something more than a thousand feet, isn't it—two or three thousand feet, isn't it?

A. I don't know, I never measured it.

Q. It is a very wide channel?

A. It is narrow in places.

Mr. Haight: The chart shows.

Q. Now coming up from Perth Amboy you come up the Kill van Kull from there, do you?

A. That is right.

Q. Until you get to the Kill the channel is comparatively wide, is it not?

A. The river itself is wide in places, but of course you can't go any place where you see water, it is just a narrow channel that you have got to go in, the river itself is wide but the channel itself is not so wide.

Q. What river do you refer to?

A. Staten Island Sound and the Kill van Kull.

Q. How long is that?

A. 18 miles.

Q. From Perth Amboy down?

A. 16 or 18 miles, something like that.

Q. In this coming up or coming down from Jones Point, you have done that you say four or five times?

A. That is right.

Q. Did you ever bring one of the ships down at night-[fol. 540] time?

A. It all depends on how the tide comes.

Q. I am just asking you the fact, have you ever brought one of the ships down at night-time?

A. Yes.

Q. How many?

A. Well, I guess two of them in the night-time—part of the night anyway on two of them.

Q. These coming down and coming up from Perth Amboy, how many times have you done that?

A. Oh a couple or three times, to my knowledge.

Q. Any of them at night-time?

A. No.

Q. Don't you agree with me, Captain, that in towing a ship through extremely narrow waters there is great advantage in towing it in the day-time over the night-time?

A. On a clear night if you have your lights lit, you can see everything, your visibility is good, they should come and go just as good in the night-time as in the daytime.

Q. Would you prefer to go at night to day?

A. If it was a clear night I go just as good in the night-time as I would in the daytime, if the visibility is good and it was a clear night.

Q. How about going up this Gowanus Channel, would you just as leave go through in the night as in the day?

A. There is no question of course that it would be a little easier to go in a place like this Gowanus Creek, you can't compare it with any navigating channel, it is all full of barges and you have to let your ship lay there and work your ship in behind you, you can't compare a place like that with a channel that is lighted, buoyed and open for navigation at all times, day or week or year.

Q. How about Newtown Creek?

[fol. 541] A. Newtown Creek is just about the same as Gowanus Canal.

Q. In those two places am I right in assuming you would prefer to conduct your towing operation in daytime rather than at night?

A. A place like that, of course.

Q. It is a question of degree then, is it not, of the width of the channel, isn't that the situation?

A. A place like Gowanus Creek is not, in my opinion, to be compared with a channel that is open for navigation.

Q. If you will stick to the question——

A. I am. You can't compare places like that with a channel open for navigation. A channel like Newtown Creek or Gowanus Canal is not open for navigation in my opinion in the night-time, it is always blocked up with lighters, tows and barges, I have seen myself lay at the end of that creek three or four hours and couldn't go in. I have seen myself take three hours to get 400 feet in Gowanus Canal, that place is closed for navigation when you hit them conditions. I can't compare that with a channel open for navigation, lights and buoys plenty on it.

Q. Let us assume you had a channel 100 feet in a river not like Gowanus Canal with all these lighters and barges in it that you refer to, but any stretch of water where your channel is 100 feet wide, you have a ship that has a beam of 51 feet, would you consider that it was quite all right to go down that channel at night-time in tow?

A. Well, we haven't had occasion to have channels of that kind here, I haven't navigated channels like that here.

Q. You are not in position to express an opinion, is that the situation?

A. We haven't got channels—I can't say anything about it, all depends how your channel would be, whether across

[fol. 542] the tide or with the tide, conditions of wind and weather, all of them have to be taken into consideration before I can give an opinion.

Q. That is because you never have done it?

A. I must know just about how the channel is before I can tell you, whether across the tide, with a fair tide or against the tide, if going across the current I have 100 per cent. of navigating channel that I go down before the tide, with the tide behind me, I can't keep under control as well as with a head tide. If I have a cross current and I don't know where the channel is I couldn't say anything about that.

Q. These narrow waters that you have testified to around New York harbor that you have towed in are narrow waters you are thoroughly familiar with, I assume?

A. That is right.

Q. I gather from the last question—why you don't feel competent to answer that last question, is because you never have towed in a situation having a channel 100 feet wide?

A. I have explained that I can't tell you.

Q. By the same token, Captain Huseby, how do you feel qualified to express any opinion about towage down the Weser River—you never have towed in the Weser River?

A. I didn't say I did, I said I am not familiar with the river.

Q. I know you did, then you told Mr. Haight there should be no difficulty in towing a ship down there. What possible basis was there for any such statement?

A. Mr. Haight told me how the current was, how the current runs and the strength of the current.

Q. What did he tell you about the current?

A. He had a head tide.

Q. Incoming tide, that is all he told you about it?

A. He had a head tide.

[fol. 543] Q. What do you mean by head tide?

A. The tide runs against him.

Q. That is all you were told about the current, isn't it?

Mr. Haight: It isn't, the force was also stated and the speed. It isn't a fair question to put, to deliberately misstate the facts of my question.

Mr. Longley: I resent the insinuation.

The Commissioner: Go ahead.

Q. (Continuing:) If anything else was told you by Mr.

Haight about the current or what you assume about the current, tell us about it.

A. The river, as I said before I don't know anything about the river, only I was told just about the velocity of the tide, strength of the tide, how the tide was running.

Q. Do you know anything about the conditions presented?

A. I said no long before, I don't know.

Q. Yet you feel justified, do you, knowing nothing more about the Weser River except that there was a channel 300 feet wide, that there was an incoming tide, to express the opinion that the towage operation down there was quite all right and such as you might find from an examination of the chart, is that so?

A. According to Mr. Haight's statement that he gives me—explains to me the conditions of the place, I have said just what I feel satisfied to say, what my opinion is about the case, that is all I can say under the circumstances and conditions of everything that happened at that time, the power he had on his ship and the conditions of wind and weather, that is where I form my opinion.

[fol. 544] Q. Have you ever had a ship sheer that you were towing?

A. Yes, I have had a ship taking a sheer while she had her own steam and using her own steering gear.

Q. What did you do to break the sheer?

A. You put your wheel over the other way, if you have a ship with her own propeller power steering, naturally put your wheel the other way.

Q. Suppose you can't use your wheel?

A. Rudder, you mean?

Q. Yes.

A. Use your towboat.

Q. It is necessary, isn't it, to know as quickly as possible that a ship is starting to sheer so that you may break the sheer, isn't that so?

A. If I am the pilot, I will explain this to you in a few words——

Q. I prefer you to answer my question first, then if you wish to explain you may, do you understand the question?

A. No.

Q. I will rephrase it. It is important if you are towing a ship to know as quickly as possible that your ship is sheering so that you may take prompt steps to break the sheer?

A. That is right.

Q. If you don't know it is sheering till she takes a pronounced sheer, why it makes it much more difficult to break the sheer, that is so, isn't it?

A. Well—but——

Q. Isn't that so?

A. Yes, that is very true, that is so.

Q. You don't know the steamship "Isis", do you?

A. I haven't seen her.

Q. You testified, as I understood you, Captain, that the steamship "Isis" would have been in better shape or was in better shape in leaving Bremen with her rudder lashed and towed with three tugs than she would have been in had she [fol. 545] sailed with her rudder in use under her own steam, that was the opinion you expressed, wasn't it?

A. That is right.

Q. On what were you relying in relation to the power of your tugs in making that statement?

Mr. Haight: Do you mean what power was he assuming?

Mr. Longley: That is right, that is what I said.

A. In the first place, you have more power in the three tugs than the ship has being a twin screw, you have a tug ahead on a hawser——

Q. Let us hesitate there a minute. The tug ahead on the hawser, how does that help you very much in maneuvering your ship in a channel 300 feet wide?

A. That is just where she comes in good.

Q. All right, tell us about that.

A. If a ship takes a sheer one way or the other he can fall off on either side one way or the other and them tugs in particular that they have in Hamburg and Bremen, I would say they are the greatest tugs that ever was produced in any country in the world.

Q. Have you seen this tug that was ahead of the "Isis"?

A. No, sir.

Q. You are speaking generally?

A. Yes, sir—because comparing to what we see here on pictures of the type of tugs that they use over there, that is taking it from them I think I am pretty near right at that.

Q. You see that tug ahead was on a line of 35 meters or about 100 feet long?

A. That is right.

[fol. 546] Q. Your ship is 51 feet beam with a tug on each side?

A. That is right.

Q. An 800 horsepower tug, what beam would they be, 25 feet each?

A. About that.

Q. So you would have a flotilla of that beam, about 100 feet?

A. That is right.

Q. How near to that bank can you go, how near the edge of the channel?

A. I am not acquainted with the river.

Q. How near to the edge of any channel can you go?

A. You can go right up to it.

Q. Say you have 100 feet out in the channel, how near do you think it is safe to pass any upcoming ship?

A. Well, the width of the towboat is plenty—the width of the tugboat.

Q. You mean you think it is quite all right for another ship to go within a couple of feet of the tugboat?

A. That tug is not a couple of feet, the width of the tugboat is probably 24 or 25 feet.

Q. You think the other ship can safely pass the tugboat by her own width, another 25 feet?

A. I didn't say her own width, I said the other ship, 25 feet——

Q. You have a tugboat alongside your ship?

A. That is right.

By the Commissioner:

Q. In other words, the clearing between the two flotillas should be not less than the width of the tugboat?

A. Between the two ships should not be less than 25 feet.

Q. You mean the flotilla in one case——

A. I mean the two ships.

By Mr. Longley:

Q. What about the tug in between?

A. I will tell you about that later on.

[fol. 547] Q. What do you mean by that?

A. When we go up these narrow channels, meeting ships of that kind, if we don't think we can pass in them places

we let one tug go—say we have three tugs assisting the ship, one on each side aft and one ahead, when we go up a narrow bend or narrow channel we take one tug, if we don't think that ship is going to pass, we let it go from the ship's side, make him take a rope over the stern, thereby if she pulls a little on one side, the tug that is lying aft holds the ship to one side, the tug ahead does likewise, thereby he can hold the ship if he has control of it, the ship is made tight to the two tugs leading aft on two hawsers, you don't have to worry about your ship, you can let the other ship go right by.

Q. Your recommendation is if going down the starboard side of a channel in narrow waters and a ship is coming up that after she comes particularly close the port tugboat should let go and go aft of the ship?

A. I don't say the port, anyone that I may see fit to let go, all depends on where you are navigating and conditions at the time where it happens, it may be so that I want to use the tug on the port side, I want to shove off a little, if the ship is ahead, go astern a little too far, I will use the port tug and let the other one go, straighten her up, all depends on conditions.

Q. How about the tug at the bow, Captain, with a channel 300 feet wide and a 30 or 35 meter line out from the bow, she certainly can't pull at right angles to the ship, can she?

A. There is nothing to stop her, is there?

Q. I should say the width of the channel, wouldn't you?

A. They sheer off a little across the tide, by that time [fol. 548] they straighten themselves up, by the time they pull themselves back across the tide, they will have the ship straightened up.

Q. Is it your testimony that in a channel 300 feet wide with the "Isis", with the beam that has been given here coming down on the starboard side with a tugboat at the starboard and port, that the tug ahead at the bow could pull directly to port on that bow and across the river?

A. He can go across the river, yes, as far as he is allowed and straighten up his ship without any trouble, if there is nothing in the way.

Q. What about the opposite bank being in the way?

A. He has got a head tide, all he has to do is pull right

across, sheer himself around, pull the ship back in position, nothing to stop him in my opinion, absolutely not, we do it in less than 300 foot space, we do it going into slips towing dead ships, going in between two piers where you probably only have 150 feet, land the ship on the end of a dock across the tide, and the tug keeps the hawser and goes right in the slip them slips is as a rule only 150 or 200 feet, most of the piers in New York.

Q. The question about the tugs giving better steerage capacity than her own rudder that you refer to is limited to narrow waters, is it?

A. That is right any place make it any place with the power the "Isis" had and the three tugs helping she had, I would say any place.

Q. You see you said on direct that in narrow waters you prefer the tugs, but in the open water you would much prefer the ship's own rudder—are you changing that testimony?

A. No, that is like going out down the bay full speed, all hooked up, a ship making 10 or 12 knots, I say yes, I am [fol. 549] not changing anything, I am only here to state my opinion about towing, I am not here to lie to you or anybody else, I am here to state my opinion.

Redirect examination.

By Mr. Haight:

Q. You have stated, Captain Huseby, on your cross-examination, that when you take command of a ship to handle her with tugs, you go on the bridge?

A. That is right.

Q. Do you have any difficulty in signaling to your tugs what orders you want obeyed?

A. As a rule not, no, as a general rule we have not, sometimes the only trouble we have here when we handle a vessel where we use a whistle and we work the whistle just according to the bell system on the tug, that is what we use them, we blow one whistle, that means one bell on the tug, blow two whistles, that means two bells on the tug, the bells from the pilothouse to the engine. The only real difficulty we have is when we have high pressure tugs alongside the ship where the steam exhaust comes out through the smoke-

stack, that makes a lot of noise at times, but as a rule we never have any trouble.

Q. One or two of the witnesses examined yesterday said that a ship would always be at a disadvantage with tugs because you couldn't tell whether the tug obeyed your orders, and you wouldn't know whether when you ordered her to go astern, she was going astern or ahead. In your practical experience have you always found it possible to communicate to tugs exactly what you wanted them to do?

Mr. Longley: Objected to as irrelevant, the experience [fol. 550] this man has had with his own tugs which he has commanded.

Overruled.

A. No.

Q. You have never had any difficulty?

A. Never have had any difficulty.

Q. You have been able to have your orders understood without difficulty?

A. I make plain what system we have. Our tugs is equipped with a small whistle on the smokestack, that is below the large regulation whistle, just a tiny little thing, and when we blow one whistle we have like a police whistle that we use to signal our tugs with, when we blow one whistle the tug answers one, if I blow two whistles the tug answers two with this little whistle, so we never go wrong.

Q. You find that when they get your orders they obey them?

A. If he don't answer that one whistle I blow again until he answers so I know he has the orders, that is the way we do it.

Q. In your experience from the bridge you have always been able to control your tugs?

A. Absolutely, all the time.

Q. You have stated that any towage operation is dangerous. When you say dangerous do you mean that it is negligence to undertake any kind of towage?

Mr. Longley: The question is objected to as quite incompetent and irrelevant, as your Honor ruled yesterday.

Sustained.

Mr. Haight: The witness has been persuaded to say on cross examination that all towage is dangerous.

Mr. Longley: I beg your pardon, he volunteered that [fol. 551] statement, I didn't even ask——

Mr. Haight: Is that supposed to mean——

The Commissioner: I don't think there is any doubt that the witness means that towage and all transportation, which is what he said, had certain risks inherent in it.

Mr. Haight: That it requires care.

The Commissioner: Requires care.

Mr. Haight: If that is all then it is all right.

Q. You said on cross examination that a tug ahead in a 300 foot channel could fall off either way and help check her sheer. Is it necessary for the tug ahead to tow at right angles to the keel of the ship in order to check a sheer?

A. Well, if he wants to check the sheer he has to come over on one side a little and pull the ship to him.

Q. But is it necessary for the tug to actually get in a position where the hawser and tug are exactly at right angles to the keel of the ship?

A. When I said that I didn't mean a position like that (indicating with the tug at right angles to the keel of the ship), that would be ridiculous, I mean if she falls off a little like this (witness draws diagram indicating), suppose you make a turn of that sort (indicate by position 1), suppose the ship comes up as far as here, you want to make this turn (indicating position 1), the boat ahead on a hawser naturally you fall off a little pulling all the while in here (indicating the tug in position 1), pulling on this side of the channel if here, the tugboat probably up here (indicating position 2 on the diagram), the hawser off like that (in- [fol. 552] dicating the tug in position 2), by the time it gets up through here (indicating position 2)——

Q. The tug is doing what?

A. Going to have the ship in this position—by the time it gets up here (indicating position 3) the tug will be straight ahead of the ship.

Q. Indicating the tug in position 3?

A. Yes.

Mr. Haight: I offer the diagram in evidence.

(It is marked Respondent's Exhibit 18.)

Q. When passing another ship in a narrow channel you have spoken about dropping one tug astern to hold the ship. Will you please state whether or not when you have a vessel in tow and you are called upon to pass another ship in a narrow channel you slow down, or do you try to pass at full speed?

A. Nobody ever passes at full speed, you always slow down and get your vessel, whatever you are towing, under control.

Q. If you do slow down and hold your vessel under control, is there any difficulty in passing another ship upbound within 25 feet of clear water?

Mr. Longley: Objected to as irrelevant, it is the Weser River, not a general situation.

Overruled.

A. I would say no, because it happened to us so many times, so often, it is an everyday occurrence, we sometimes go down and we have to let the tug go in order to leave [fol. 553] room enough, but of course the operation has got to be done by a little care and there isn't any danger that I can see—it happens every day.

Q. In Exhibit 18, you have indicated the towed vessel going around a bend. Please state whether or not the tug ahead is of any use whenever you are making a turn in a narrow channel.

A. He is about the most important unit that you have on a transport, job of that kind, if you have to make a turn with a dead ship, because he leads you no matter where you want to go, he blows all the whistles for general traffic and all, he is the leading tug ahead that takes care of a job of that kind, he is really the main support.

Recross-examination.

By Mr. Longley:

Q. This system of whistling from the bridge of your ship to your tugs, I take it in your opinion is the prudent way to exchange signals with the tugs?

A. Well, what I meant to say when I said it, that is the way we give the tugs orders.

Q. Yes.

A. That is right.

Q. You have found, I assume, from your testimony, by experience that is the prudent method to employ, is that so?

A. That is right.

Q. These ships that go in Shewan's that you have towed back and forth, and these ships you brought down from Jones Point didn't have cargo on board, did they?

A. This one in particular from Jones Point had no cargo, no, they are light.

Q. And those that you tow in and out of Shewan's don't have cargo either, do they?

A. Well, I wouldn't say all the time, it may be times that they have cargo in them.

Q. That is not a matter you would know about?

A. Well, I know cases where they have had cargo, yes, [fol. 554] I have had ships since I have been in Shewan's drydock that have been going to drydock, that is with part cargo. I wouldn't say fully loaded, but as a general—I wouldn't say general thing, but there are oftentimes a ship has a propeller damaged, rudder damaged, and they take her to the pier, take out a certain amount of cargo probably or certain extent of cargo and tow her to drydock, particularly when they do a job like a tailshaft or propeller wheel or rudder job, if they have stern frame or something like that, they may rather than lose time in drydock, have the ship laying there, they take out sufficient cargo at the pier, take the steamer to drydock, they probably——

Q. That is enough answer, unless Mr. Haight wants you to go on?

A. I thought I would explain as near as I can.

Q. I think you have answered the question. You have used two terms here, one of towage and one of transportation, you use them in much the same meaning?

A. If I did that it is the same thing.

Q. You spoke of towage and transportation, you mean the operation of taking a ship from one point to another under tow?

A. That is right.

Q. That is what you mean by transportation?

A. That is all.

By Mr. Haight:

Q. Captain Huseby, the testimony in this particular case is that orders were given from the bridge to the tugs by megaphone, have you ever had occasion to give orders to tugs by megaphone?

A. We have at times, but it don't happen very often, because the distance sometimes would be so great, and a lot [fol. 555] of noise sometimes they really wouldn't understand us, get what orders you may give.

Q. If you had a tug alongside?

A. I would probably be able to explain this a little better. Sometimes your tugboat captain is in the pilothouse, he has got no time to make his logbooks—at times—and when he makes fast alongside of a steamer sometimes in the front pilothouse, naturally he picks up his book and writes down his daily routine work, he is not looking, because if I blow the whistle he will know my signal, thereby I attract his attention, I could take the megaphone and stay up there half a day hollering and he may think I am hollering at somebody else.

Q. If you had a tug alongside and were actually in process of towing a boat, would you hesitate to use a megaphone?

A. No.

By the Commissioner:

Q. Captain, your answers to Mr. Haight's questions, I think have been on the assumption that the rudder of a vessel under tow is fixed amidships and is straight, not bent, am I correct in that?

A. That is right.

Q. Would your answers in respect to the prudence of towing such a vessel with three tugs under the conditions described be any different if the rudder of the vessel were somewhat bent, say 5 degrees in the lower half of it?

A. It would not make any difference in my opinion, in my opinion it would not make any difference.

Q. You wouldn't be concerned over a slight bend?

A. No, no.

Q. Wouldn't that have some tendency to give the ship a port or starboard helm?

A. It would have a little, but not to affect you any, not in [fol. 556] this case at least, because you have all that power

and there is no reason why that couldn't be overcome without any trouble, in my opinion you shouldn't—did I understand you to say over 3 or 4 degrees?

Q. 5 degrees?

A. That is all right, it would not, in my opinion.

By Mr. Longley:

Q. Suppose there were 30 degrees bend in a rudder, Captain?

A. She would have a tendency to go over, the more cant you have on the rudder—it is rather a funny question, because we all know that the more the rudder is over the more she sheers, that is what the rudder is there for.

Q. Then you would consider it dangerous if the rudder was 30 degrees?

A. No, I wouldn't say so, I have towed them with the rudder hard over all the time out of ship yards, transporting from one dock to others, and I have seen the rudder hard over either way and if we tow her that way, figure accordingly.

Q. Of course you have to know that?

A. You go on a ship, the ship was on drydock, laying at the end of the drydock, they drop the ship down, you see the rudder is hard over.

Q. So if you know it, you feel that you could tow a ship with the rudder bent 30 degrees any distance you wished through narrow waters without any difficulty whatever?

A. If I know something about it, yes, because I would be prepared for it.

Q. Suppose it was bent 60 degrees?

A. If I was prepared for it, yes.

Q. Even 60 degrees?

A. If I was prepared for it, it could be hard over.

Q. How much of a bend do you say is necessary in a [fol. 557] rudder before it begins to have material effect in making her sheer?

Mr. Haight: What speed are you assuming?

Q. (Continuing:) Assume a speed of 5, 6, or 7 knots.

A. How fast has she got to go before she starts to sheer, you mean, with the wheel hard over?

Q. I asked you how far she has to be bent before it will materially affect the ship and make her sheer?

A. All depends on the size of the rudder and speed of the ship.

Q. I am asking you to assume a rudder such as appears on the plant marked Respondent's Exhibit 6 and a ship going at a speed let us say of 8 knots?

A. Well, you would have to have that rudder over 10 degrees and you would have to go more than 6 miles an hour before you would feel it.

Q. You think 10 degrees and over 6 knots would make her sheer to starboard if it was bent to starboard?

A. Yes, it would have to go more than 6 miles an hour.

Q. How much more?

A. That is sufficient, 6 miles or more, I said.

Q. 6 miles or more?

A. Yes.

Q. And 10 degrees?

A. Before you feel it at all.

Q. 5 degrees, whatever the speed, you don't think would affect the ship at all, is that right?

A. I am just saying, just giving my opinion, I am saying about 6 miles per hour and 10 degrees over.

By the Commissioner:

Q. He is asking you now—that was 10 degrees. You say [fol. 558] you wouldn't feel a 10 degree set in the rudder until you got up to 6 miles an hour?

A. And more.

Q. Now Mr. Longley wants to know, suppose it was a 5 degree set in the rudder—half as much—how fast would you have to be going before you would feel that, or wouldn't you ever feel it?

A. Well, the slower you go the less you feel.

By Mr. Longley:

Q. We understand that, but could you go fast enough with a 5 degree bend in your rudder to make it affect the ship any?

A. Well, it would affect the ship very little, tell you why, you got to have at least 3½ or 4 knots on the ship before she will steer at all. You can go along with say 3½, that is just about steerageway, then you have to have your wheel hard over before she answers at all, so in my opinion

say 5 or 6, 8 or 10 degrees, it would be so little you wouldn't feel it, of course it all depends how fast your ship is going, you see steerageway on the ship is probably 3½ or 4, then she will just about steer with the wheel hard over both ways, so 10 degrees or 5 degrees with a speed of 6 miles you wouldn't feel it—just about feel it.

By Mr. Haight:

Q. Captain Hirsoby, the steamship "Isis" was put in drydock at Bremen—I show you Exhibit 6—water was pumped out until it was below the fourth arm from the top, which is marked by the letter X, and with 12 or 13 feet of the rudder fully exposed, the surveyors first had a diver go down before the boat was docked who reported the [fol. 559] rudder was fair, then after the boat was pumped out in the dock they felt the arms and tried with sticks—not described, a straight edge of some kind—they found no indication of any bend at all below the fourth arm and they found above the fourth arm the entire rudder fair. When the ship was docked a second time after the second stranding they found that there was a slight bend to starboard, beginning certainly not higher than the middle arm. If it existed originally, not showing above the fourth arm and at the bottom the deflection was a total of 5 degrees at the corner of the rudder, will you state whether or not in your opinion a rudder which is 12 feet fair and bent only 5 degrees at the extreme bottom would create such a condition that it could ever be noticed with three tugs towing her and her own engines working as described in the "Isis"?

Mr. Longley: I object to the question, no proof that the witness is qualified to answer any such question. He never has commanded a ship under any such conditions or any conditions.

Overruled.

A. Well, how fast was the ship going through the water at the time?

Q. The ship was going at a maximum of 8 kilometers through the water or between 5 and 6 miles.

A. It would not affect her.

By Mr. Longley:

Q. You will agree, will you not, Captain, that those who actually saw the rudder are in the best position to form an

[fol. 560] opinion as to whether or not it was in a dangerous condition?

A. That is a question I can't answer, I don't know the men, I don't know the boat.

Mr. Longley: I renew my motion that the witness' testimony and opinion should be ruled out on the ground from his own evidence he is unqualified to express the opinions he has.

Motion denied.

Mr. Haight: Respondent rests.

Mr. Longley: I offer in evidence the translation of extracts of the deck and engine room logs produced by Mr. Haight and furnished to me while the captain was being examined.

Mr. Haight: No objection.

(They are received in evidence and marked Respondent's Exhibits 11 and 12, having heretofore been marked for identification with those numbers.)

[fol. 561] LIBELLANT'S EXHIBIT A

Translation

Copy.

Board of Marine Inspectors at Bremerhaven, Bremerhaven, March 24, 1928

Present:

President: Dr. Koch;
Assessors: Captain Wuehrmann,
" Johnsen,
" Schmidt,
" Scholtz.

Clerk, Chief Secretary of the Court, Thies, Commissioner of the Reich, Rear Admiral Thiele.

Hearing in re Motor Vessel "Isis", of Hamburg, which grounded Twice in the River Weser, on February 6th and on February 10th, 1928, Respectively

At the opening of the hearing the following witnesses were present:

1) Captain Krueger,
2) First Officer Schier,
3) Third Officer Schwartz,
4) Chief Engineer Fohrmann,
5) Second Engineer Christiansen,
6) Boatswain Buse,
7) Boatswain Ruedel.

(1 to 7 belong to the crew of the M. V. "Isis".)

[fol. 562] 8) River pilot Schmidt,
9) Captain Nannen, of the steamtug "Hoheweg",
10) Captain Klaassen, of the steamtug "Lankenau",
11) Captain Zey of the steamtug "Eversand".

In view of the possibility that the above-named witnesses might have to swear to their depositions, their attention was called to the significance and sanctity of an oath and the consequence of perjury.

The witnesses under 6) and 7) were then ordered to return to the waiting room.

The president then read from the dossier the present status of the investigation in this matter, and in particular read the statements contained in manual /1/ of the dossier.

The parties were represented by: Attorney-at-Law Dr. Ehlers for Captain Krueger, and Captains Bruenjes and Sachse for the tugboat captains of the Unterweser Shipping Company.

Thereupon, the Court proceeded to take the testimony, and the witnesses were heard, successively, as follows:

1) Captain Krueger—not under oath: Identity of witness: My name is Bernhard Paul Krueger; I was born October 24th, 1877 in Tilsit; I am the captain of the M/V "Isis".

The witness submitted a Full Master's License issued by the Executive Department of the Free City of Luebeck, dated September 21, 1906.

Substance of the witness' testimony: I arrived with my vessel from the Pacific coast of America with a cargo of [fol. 563] lumber and general merchandise. The draught of the vessel when on the river Weser was 23 ft. 3" forward, and 23 ft. 5" aft. At Bremerhaven, on February 6th, last at about 1 A. M., pilot Siedenburg boarded us, who took us up the river Weser. At first the weather was clear, but at mile post 27.5 a sudden fog set in. The pilot ordered the engines slowed up. But I told him, that it would probably be better to anchor. The pilot agreed with this. We took soundings and found 6½ fathoms of water around us, and we let go the starboard anchor and gradually let out 30 fathoms of anchor chain. At first the anchor dragged. It was shortly before high tide, and as the ship must not swing around (?), we kept her in the channel by using the engines. The ship was lying in this position for perhaps 20 minutes. Judging by the lights marking the course which I was able to distinguish just before letting the anchor go, the M/V "Isis" lay in the middle of the channel. At 7 o'clock, when the weather cleared, we found that the vessel was fast aground from the starboard bow to about amidships; her bow lay across the channel pointing towards the west river bank. We took soundings, and thereupon I ordered the engines ahead, but the ship would not come off. There was four feet less water than the vessel's draught. The pilot reassured me and told me that there was no danger to the ship. Meanwhile, the tugs "Rotesand" and "Roennebeck" arrived and made fast alongside. At 12:50, the stern of [fol. 564] the "Isis" unexpectedly swung around; and she was now in deeper water. I tried in vain to hold the vessel and she struck the east bank with her stern. After that, the anchor chain lay to starboard. The tugs had tried in vain to pull her over to starboard. When the engines were ready, I gave some more anchor chain and tried again to get the ship off. In the meantime, the tide had risen again. After floating, we proceeded to Bremen; we noticed, however, that the vessel continually sheared to starboard. The vessel had not made any water as a result of the accident. At first, one of the tugs made fast at the bow, the other at stern, afterwards both tugs towed us by the bow, but it was difficult to control the vessel. Upon the arrival of three additional tugs, one made fast to each side, and the

others to the bow. In this manner we arrived in the harbor of Bremen towards 9 or 10 o'clock P. M. There, part of the cargo was discharged.

No mud had entered the engines in the course of the above accident; the engines not having worked for a considerable time, had grown cold so that they fired with difficulty. After discharging the cargo, the ship was taken to the dry dock of the Weser A. G. in order to ascertain the position of the rudder blade. The diver found that the rudder lay straight. The rudder was then tied fast, secured by means of ropes and the hand brake made fast also. It had become apparent that the rudder-stock was twisted. By order of my owners, the "Isis" was to pro- [fol. 565] ceed to Hamburg with the assistance of tugs. I was told that a certificate of seaworthiness would be issued. I have not seen such a document. At the time of the accident the wind was WSW.

The Buoy Captain Brehme, being present in the court room, testifies in answer to questions:

The width of the river Weser at the place of the accident is at high tide 135 meters and at low tide 100 meters; the depth at high tide is in the middle 11,8 meters, at low tide 7,30 meters. The blue lines on the map before the court indicate the measurements at low tide, the red ones those at high tide.

Captain Krueger testifies in answer to questions by his counsel:

In view of the assurance given me by the pilot, I had no reason to assume that the vessel was in any danger.

Thereupon the statement of pilot Siedenburg was ordered read.

Captain Krueger stated further:

The statement of the pilot as read is correct. When the weather cleared, the bow of the vessel lay to starboard. The Germanic Lloyd in Bremen has not surveyed the vessel.

Captain Bruenjes explained that one tug had been ordered for the "Isis," and that another tug had been sent along to be available in case of need.

[fol. 566] Captain Krueger continued:

On February the 10th last, we proceeded for Hamburg. We were towed by the seagoing tug "Hoheweg" and besides, on each side an additional tug made fast fairly well aft. There then arose some difference of opinion as to the power of the engines of the tug "Hoheweg," since according to the manual for the Merchant Marine, only 680 HP are registered. The data appearing in the manual regarding the tugs "Lankenau," "Eversand," and "Hoheweg," were read aloud. Thereupon, Captain Nannen of the "Hoheweg" produced a certificate drawn up by the Germanic Lloyd (signed Biese) on October 2, 1924, according to which the engines of the tug "Hoheweg' indicate 1080 HP.

Captain Krueger continued:

Whether the captains of the tugs were given full information, I do not know. The Hamburg office looked after that. The pilot at first hesitated on account of the strong southerly wind. The wind having calmed down, however, we proceeded on our voyage. In the beginning, everything went smoothly. The commands were called out to the tugs. We then passed two dredging machines and afterwards a small steamer. As we were sailing in the middle of the channel, I told the pilot that it would be better to leave some more room for passing, "Wir gingen daraufhin etwas nach Steuerbord, um dann wieder die Mitte zu halten.

[fol. 567] Libellant's Proposed Translation	Respondent's Proposed Translation
We thereupon went over a little to the starboard side, but later we held on again to the middle of the channel.	We thereupon went over a little to the starboard side in order (i. e. intending) again to resume the middle of the channel."

In the meantime, the engines were going steadily. The vessel, however, did not come back to port, but had the tendency to shear to starboard. The tide was coming in. I also asked the captains of the tugs if their engines were going full speed, to which they answered in the affirmative. The draught of the vessel was 18 feet fore, and 23 feet aft. The Lesum beacon had just been passed clear, whereupon

the "Isis" ran aground at the Vegesack pier. We tried to get off under our own power and with the assistance of the tugs, but did not succeed. The vessel swung around still further and came to a stop crosswise in front of the Lesum. The river current was unusually strong. I firmly believed that the tugs would have held the vessel, so that a stranding would have been avoided. The two tugs alongside had tried to pull the vessel off by the stern, whereas the "Hoheweg" was to bring her bow around. Notwithstanding the assistance of two additional tugs, it was not possible to improve the position of the vessel. The position of the vessel as shown on the map before me is correctly indicated. I noticed [fol. 568] that the vessel was resting on a bank. The attempts of the tugs to move the vessel were continued until one hour after high tide; during that time the engines of the "Isis" worked continually. In order to lighten her, I ordered lighters from the agency of Klingenberg in Bremen. From Hamburg came the report that two large lighters were on their way. With the next incoming tide we resumed our attempts to pull off the "Isis" towing forward and backward; but could not move her. The Schuchmann tug "Seebaer" and still other tugs were taken on. The manoeuvre was conducted by river pilot Schmidt, as pilot Siedenburg, possibly on account of the events, did not seem to be fit any longer. The vessel sat fast aground in the way of hatch No. 3 about the middle of the ship. At low tide, the "Isis" started to strain, and a sharp crack was heard. The deck was cracked over a length of one meter on the starboard side and the hull plates bent. The vessel, at first, did not make any water; the water that later entered the ship could be controlled by our own bilge pumps. After two additional Lloyd tugs had been taken on, they succeeded finally, jointly with the other tugs, to float the vessel, whereupon we returned to Bremen with the assistance of tugs. At the start of the voyage from Bremen I had no apprehensions, whatsoever, as I have experienced similar situations before. Moreover, the night was very clear. We carried two red lights. The hour of the departure from Bremen had been fixed after consulting with the pilot.

[fol. 569] It was ordered, to take the testimony of Baurat Landmark, as to the position of the ship at the place of the disaster.

Witness Landmark testifies under oath:

Identity of the witness: My name is Karl Landmark; I am 55 years of age; I am government surveyor of works with the Department of Waterways at Bremen.

Substance of the witness' testimony: I arrived at the ship after she had grounded at the place indicated on the map. The map in question has been submitted to the Board of Marine Inspectors. At the spot where the "Isis" lay, the depth at high tide is fully 5 meters. The highest point of the bank on which the ship was stranded lies in a westerly direction from the middle. From time to time there appeared to be a certain amount of water under the ship. By the stern, the "Isis" was afloat. At that point there was 11 meters of water at high tide, but it dropped to 8 meters. The "Isis" was aground from the bow to the aft end of hatch No. 4.

Thereupon, the report of pilot Siedenburg regarding the second accident was read aloud.

Captain Krueger, in answer to questions, stated:

There was no intention to steer the vessel by means of lines.

3) Witness Schier—not under oath:

Identity of witness: My name is Fritz Karl Henry [fol. 570] Schier; I was born on September 28, 1890, at Cuxhaven; I am First Officer on board the "Isis."

The witness produced a Full Master's License dated September 3, 1925, issued by the Governor of Schleswig.

Substance of the witness' testimony: The statements as made by the Captain, regarding the accidents, are correct. When the first accident occurred, I came up on the bridge only at 4 A. M. I could not see a thing. My watch lasted till 8 o'clock. It is true that the stern of our vessel was up against the east bank of the river. The manoeuvres in connection with the first accident are correctly reported, as far as they were carried out in my presence.

While in dock, the brake of the vessel was tightened and the lines secured, so that the rudder was securely fastened. The pilot had no apprehensions as to the propriety of sailing. We passed two dredges and one steamer. During

this trip, I was on the bridge until about 2:30 o'clock. It surprised me that the "Hoheweg" could not hold the bow of the "Isis." I did not see the accident happen, but arrived later when the "Isis" was aground by the bow, near the pier. In the evening, when the Lloyd tugs came to our assistance, the ship began to move. We kept sounding the bilges. A real leak did not exist. The hull was only dented.

Thereupon, Captain Krueger, in answer to questions, stated:

On the trip from Bremen to Hamburg both engines [fol. 571] worked though slowly and from time to time at half speed. At times we proceeded at good speed. On account of the steamer to be passed, the speed was reduced. The distance from the easterly river bank could not be estimated. The steamer passed us very close. In addition to the red lights mentioned above, we also carried white mast head lights. When the steamer passed us, we did not feel whether we touched the ground. At that time, we might have been at a distance of ¼ mile from the place of the accident. The ship made very little headway at that time.

4) Witness Schwarz—not under oath:

Identity of witness: My name is Friedrich Wilhelm Schwarz; I was born at Charlottenburg on September 5, 1898; I am Third Officer on board the "Isis."

The witness produced a certificate, being a Full Master's License, issued on October 30, 1926 by the Chamber of Commerce and Shipping at Hamburg.

Substance of the witness' testimony: At the occurrence of the first accident, when the ship was aground, I came up on the bridge at 8 o'clock. The captain's statement as to this accident is correct. At the occurrence of the second accident, I was standing forward on the forecastle. Shortly before we arrived at Vegesack, I left. I am not in a position either to estimate the distance from the easterly river [fol. 572] bank. The hawser used by the "Hoheweg" for towing the "Isis," might have been of approximately 35 m length. The "Isis" was held by short lines. After having passed the above-mentioned steamer, I left the watch.

I did not notice that the vessel went to starboard. The statements as to the subsequent manoeuvres are correct.

5) Witness Schmidt—not under oath:

Identity of Witness: My name is Fritz Schmidt; I was born on October 28, 188– at Verden; I am a river pilot by profession.

The witness produced a Full Master's License issued on September 30, 1914 at Elsfleth.

Substance of the witness' testimony: I have been a river pilot for the past five years. On the day in question I was summoned to the place of the accident and arrived there at 11 A. M. The vessel was in a position as indicated in the drawing. I suggested that the vessel be lightered at once, which, however, had been done already by her captain. I also suggested the assistance of a tank lighter. It was absolutely necessary to discharge the cargo, as the vessel had grounded at an unusually high water level. By the bow the "Isis" was lying against the pier, from the forecastle to the bridge she rather floated, then came the bank, whilst she floated by the stern. At 17:40 o'clock the tugs made fast to the vessel. It was assumed that the [fol. 573] water level would be 2,80 m, that is 0,60 m less than at the previous high tide. The tugs pulled in all directions, in order to float the vessel, the "Isis" thereby also using her own power. Shortly before the high tide, the efforts still proved of no avail. I therefore advised to fasten also the two Lloyd tugs, that happened to be there, to the ship. The Captain of the vessel agreed to this, and thereupon the "Herkules" was fastened on the starboard side and the "Vulcan" on the other side of the "Isis." Through different manoeuvres, the "Isis" finally was floated at 18:45 o'clock. As a precautionary measure, a pump steamer was put alongside, the water in the vessel, however, was not rising. With two tugs by her bow, two on starboard and two on the portside, and using also her own power, the "Isis" returned to Bremen. The statement that we carried two red lights is correct.

Baurat Landmark, in answer to questions, deposes:

There was water running under the bow of the ship, in the middle, and once in a while here or there.

Witness Schmidt, in answer to questions, further stated:

My soundings tallied with those of Baurat Landmark.

6) Witness Fohrmann—not under oath:

Identity of witness: My name is Friedrich Johannes Reinhold Otto Fohrmann; I was born on March 10, 1883 [fol. 574] at Bergedorf; I am Chief Engineer on board the Isis."

The witness submitted a license issued at Hamburg on October 30, 1908, certifying that he is a machinist of classification I for sea-going steamships and another license also issued at Hamburg, dated February 12, 1926, certifying that he is a machinist of classification I for motor vessels.

Substance of the witness' testimony: The engines, if hot, start very easily; if they are cold, however, there is some difficulty. The reversing motion may take about one minute. At the time of the first accident, the engines did not sustain any damage. As a result of the extended stop, the motors fired only with difficulty; they required too much air. The manoeuvres were too short. Since the motors did not start, the engines could not work. I refer to my report regarding the engines. Such manoeuvres as marked therein were carried out. My report as to the trip from Bremen to Hamburg is correct, I repeat it herewith and refer to its contents. The engines were in good order. I refer particularly to the damages caused to the engine, as they are described in my report. It is absolutely necessary that the entire machinery be overhauled. I did not notice that the ship touched the ground shortly before the stranding at Vegesack, nor did I hear any friction. I have to rectify my statement, however, that the reversing motion takes one minute. If the motors fire at once, the reversing motion takes at the most 25 seconds. I was mistaken about that fact.

[fol. 575] 7) Witness Christiansen—not under oath:

Identity of witness: My name is Martin Christiansen; I was born at Bochum, County of Flensburg, on April 18, 1891; I am Second Engineer on board the M/V "Isis."

The witness submitted a certificate issued by the Governor of Schleswig on October 26, 1918, according to which

he is a machinist of classification I for sea-going steamers, and a similar certificate, regarding motor vessels, dated October 1st, 1926, issued by the same authority.

Substance of the witness' testimony: At the time of the first accident I kept the watch. The statement as to the engines is correct. The reversing motion takes about 15 to 20 seconds. The depositions of the Chief Engineer as to the second accident are correct. I did not notice either that the vessel touched the ground before the stranding.

8) Witness Buse—not under oath:

Identity of witness: My name is Johann Buse; I am 17 years of age; I am boatswain on board the M/V "Isis." After a brief hearing of the witness, his further testimony was waived by unanimous consent.

9) Witness Ruedel—not under oath:

Identity of witness: My name is Alfred Ruedel; I am 30 [fol. 576] years of age; I am a boatswain on board the M/V "Isis." As in the case of the witness Buse, the testimony of this witness was waived by unanimous consent after a brief hearing.

10) Witness Nannen—not under oath:

Identity of Witness: My name is Heero Nannen; I was born on March 3rd, 1887 at Nordgeorgsfehn; I am captain of the tug "Hoheweg."

The witness produced a Master's License for Small Coasting Trade, issued by the Governor at Stade on February 24th, 1926.

Substance of the witness' testimony: I had instructions to tow the M/V "Isis" by her bow. For the connection I used a hawser of 3" by 60 m length, of which approximately 35 m were used for the tug connection. The "Isis" repeatedly sheared to portside and starboard side. At the beginning, I received instructions by the steam whistle, to tow either in the one or in the other direction. Later on I used my own judgment. After we had passed the steamship, the "Isis" would not go back to portside. I had

sheared out to portside and needed full power to pull her bow over. The "Hoheweg" thereby lay aslant to one side. After the "Isis" had grounded, I kept on towing to portside, her bow, however, turned farther off towards the Lesum. I could not tow off against the tugboats and the current. I believe that the steamer was passed near the [fol. 577] Moorlosen Church. The hawser belonged to the tug. It was known to me that the "Isis" had sustained damage to her rudder. If I alone had done the towing, I would have attained a speed of three miles.

11) Witness Klaassen—not under oath:

Identity of Witness: My name is Hinrich Klaassen; I was born on June 8th, 1875, at Lienen in Oldenburg. I am captain of the steamtug "Lankenau."

The witness produced a Master's License for Small Coasting Trade, issued at Elsfleth on March 16th, 1926.

Substance of the witness testimony: During the trip from Bremen to Hamburg I was on the portside; it was known to me that the "Isis" had sustained damage to her rudder. I was fastened at the bow and the stern with a hawser. From the bridge it was called out to me whether a forward or a backward course should be taken. When the steamer was passed I went full speed ahead, and put the helm hard a-starboard. Afterwards the helm was put amidships and the engine ordered to a full backward course. At mile post 17.2 I went continually backward because of the tendency of the "Isis" to turn to portside.

12) Witness Zey—not under oath:

Identity of witness: My name is Johann Zey; I was born on September 29, 1887 at Erfde (Schleswig-Holstein); I am captain of the steamtug "Eversand."
[fol. 578] The witness submitted a Master's License for Small Coasting Trade, issued at Elsfleth on September 24, 1926.

Substance of the witness' testimony: My steamtug lay on the starboard side of the "Isis" and had made fast fore and aft. The manoeuvres were called out to me from the bridge. When passing the steamer mentioned before, I went full power backwards, otherwise always full power

forwards. The vessel turned also to portside. After having passed clear of the Lesum beacon, the "Isis" proceeded straight ahead, that is, she did not turn to portside any longer.

Captain Krueger, in answer to questions, deposes:

Both screws of the "Isis" turn outward. The ropes were fastened when we went into dock.

It was resolved to hear Mr. Plate, Director of Water Works, being present in the room.

13) Witness Plate, Director of Water Works—not under oath:

Identity of witness: My name is Ludwig Plate; I am 44 years of age; I am Director of Water Works.

In substance, the witness gave explanations as to the width and other conditions of the channel. He stated that the part of the channel being in question here formerly had a normal width of 100 m, and that it had now been enlarged [fol. 579] to 140 m; that the easterly river bank ought to be still more flattened which, however, could not be done on account of the industrial plants; that further projects for widening ought to be laid before the government; that the current of the tide is particularly strong towards the Lesum.

The taking of testimony was closed herewith, and the Commissioner of the Reich was called upon. He declared that the first accident was caused by an act of God; that there was no fault to be found with the manner in which the manoeuvres were carried out. As to the second accident, he raised the question if it had not been wiser to have an emergency repair made in Bremen before sailing. From a nautical point of view, there was no objection to start on a voyage with the assistance of tugs. The ship's officers had not been aware of the fact that the vessel had the tendency to continually turn to starboard. The bends of the river were the cause that the ship's officers, as said before, had not come to realize that fact. The current of the tide was to catch the ship's bow because of the fact that the ship made no headway before the stranding and that the bend of the river had to be overcome. In the interest of safety,

therefore, it would have been better to have the above-mentioned emergency repair carried out at Bremen before sailing. He said that no motions would be made, as otherwise no fault had been found with any of the actions taken. No defects had been found to exist in the channel.

Thereupon, the parties concerned or their representatives, respectively, were given an opportunity to make addi-
[fol. 580] tional depositions. Attorney-at-Law Dr. Ehlers, appearing for Captain Krueger, said that efforts should be made to have a regulation introduced which would render the assistance of tugs compulsory in the river Weser. In his opinion though, the accidents were due to the local conditions and, in particular, to conditions in the river as they existed at the critical time.

The Board of Marine Inspectors thereupon retired for deliberation. Upon its return the annexed decision was pronounced—its phraseology subsequently to be put into a more definite language.

Certified.

(Sgd.) Dr. Koch. (Sgd.) Thies.

For the correctness of the copy:
(Signature) —— ——, Member of the Board of Marine Inspectors.

[fol. 581] LIBELLANT'S EXHIBIT B

Translation Furnished by Carl Geller, 16 Exchange Place, New York City, Bowling Green 10110, for H. N. Longley

Folder No. A 4619-1. Vessel: S/S "Isis"

Court of Admiralty at Bremerhaven

(Seeamt)

In the investigation concerning the Hamburg motor ship "Isis", having grounded twice, the following decision has been announced on the basis of the main proceedings that took place at the public session of March 24, 1928 in which took part

(1) The acting Presiding Judge, Dr. Koch;

(2) as Assessors:
(a) Capt. Wührmann,
(b) Capt. Johnsen,
(c) Capt. Schmidt,
(d) Capt. Scholtz;

(3) As Court Clerk: Thies;

(4) As Federal Commissioner; Rear Admiral, retired, Thiele.

On February 6, 1928 while the Hamburg motorship "Isis" was proceeding up the river Weser, she anchored at kilometer 27.5 by reason of fog having set in, and with the outflowing ebb tide she grounded. She got off under [fol. 582] her own steam and in doing so, her stern touched the E shore of the river and she sustained damage to her rudder.

The accident must be attributed to force beyond control.

On February 10, 1928 the motorship "Isis" left the Wharf port of the Weser Company Ltd. assisted by three tugs, after first having made her rudder stationary and proceeded downstream. She grounded near the landing bridge of Vegesack and was shoved by the current athwart of the mouth of the river Lesum. On this occasion the SS "Isis" sustained heavy damage and the engines were considerably strained through the efforts of floating the vessel.

The accident has to be ascribed to the fact that on that day an exceptionally strong tide current caught the vessel at the port bow while her steering capacity was limited, so that in spite of all efforts it was impossible for the tugs to keep the steamer within the fairway. No fault attaches to the Master and officers of the SS "Isis".

Nor can the Master and officers be reproached for having started the voyage of the SS "Isis" while her steering capacity was limited.

There did not exist any defects in the ship's equipment or in the fairway. The measures taken after the accident were adequate.

Reasons

The motor ship "Isis", home port Hamburg, has the distinguishing signal R C Q W and is owned by the Hamburg

America Line. The vessel was built of iron in 1922 at Hamburg and measures gross 4454.4 and net 2618.3 register tons. Her length is 114.7 meters, her beam 15.8 m. and her depth 7.9 m. The crude oil motor of the vessel has 2200- [fol. 583] HP. The vessel has a crew of 47 men and her Master is Capt. Bernhard Paul Krüger, born on October 24, 1877 at Tilsit who has a Master's license, any ocean, issued on September 21, 1906 at Lubeck.

Coming from the West Coast of North America, the vessel passed on February 5, 1928 at 9.05 p. m. the Weser Lightship. Her cargo consisted of lumber and general merchandise. Her draft at the bow was 23'3" and at the stern 23'5". After having changed pilots at Bremerhaven at 1 a. m. and shipped river pilot Siedenburg, she proceeded up the river with the tide coming in. At first the weather was clear, but at kilometer 27.5 fog suddenly set in. At 3.20 a. m. on February 6 the Master, having first consulted the pilot, decided to anchor. Having taken soundings and found 6½ fathoms of water, the starboard anchor was dropped and they let go about 30 fathoms of chain. As it was shortly before high water and the Master wished to prevent the vessel from swinging, the head of the vessel was at first kept upstream by means of the engines. About 20 minutes later the ebb tide set in. From the shore lights which they had just been able to recognize before dropping the anchor, they found that the vessel was lying in the middle of the fairway. Sea watch was placed and the regulation fog signals were given. When the fog lifted at about 7 a. m., it was found that the vessel had grounded on the starboard side from the bow to amidships. Soundings were taken and it was found that the vessel had 4 feet less water than her draft. The forepart of the vessel was resting in 18 feet of water and it was therefore not possible to get the vessel off with her own engines. At about 9.30 a. m. the tugs "Rotesand" and "Rönnebeck" appeared on the scene. Of [fol. 584] these tugs one had been ordered to take the vessel in tow near Vegesack, but as a precautionary measure the Lower Weser SS Co had sent an additional tug along with the tug ordered. At low water at 11.10 a. m. new soundings were taken and the following depths were found: at bow 3 fathoms, No. 1 hold, port 5 fathoms, starboard 3 fathoms; No. 2 hold port 5.2 fathoms, starboard 3 fathoms; No. 3 hold port 5 fathoms, starboard 3 fathoms; No. 4 hold

port 5.1 fathoms, starboard 4.9 fathoms; over stern 5 fathoms. On repeated questioning both the pilot Siedenburg and the masters of the tugs assured the Master that there was no danger whatever for the vessel. Further soundings were taken at 12.15 p. m. and it was found that the bow of the vessel had still a depth of water of 19 feet, which was 4 feet below the proper draft. With the incoming tide the vessel suddenly swung with her afterpart at 12.47 p. m. Although attempts were made to hold the vessel, her stern struck against the E shore of the river. In spite of the attempts made with her own power and assisted by the tugs, to get the vessel back into the middle of the fairway, all efforts made in this sense were vain due to the strong current and the WSW wind. In addition the starboard motor failed after both motors had been started, and the port motor alone was insufficient. According to the statement of the Chief Engineer the failing of the starboard motor must be ascribed to the fact that both motors had remained idle for some time and therefore required too much air for ignition. After lengthy attempts they succeeded at last, at about 2.30 p. m. to float the vessel and they proceeded. During the passage it was found that the vessel continually tended to swing to starboard. This made [fol. 585] it very difficult to keep her within the fairway. For this reason three additional tugs were engaged at Vegesack, there being thus one tug each alongside at port and starboard and 3 tugs pulling at the bow. At about 9.20 p. m. they reached Bremen and made fast at shed 11.

The width of the fairway at the site of the accident is according to the statement of Chief Stream Inspector Brehme at high water 135 m. and at low water 100 m.; the depth at high water in the middle 11.8 m. and at low water 7.30 m.

After the part of the cargo destined for Bremen had been discharged, the SS "Isis" went into the dock of the Weser Co. Ltd. Here the vessel was lifted as far as necessary in order to ascertain the damage which the rudder had evidently sustained. The investigation showed that the rudder, although lying well amidships, had the blade and the stock twisted in relation to each other. On instructions received from the owners, the Master decided to proceed to Hamburg with the assistance of tugs. The Inspectors of the Shipowners who were present at Bremen had

told Capt. Krüger that the Germanic Lloyd had issued a certificate of seaworthiness, but this certificate of seaworthiness was not submitted to him. The proceedings before the Admiralty Court have not shown whether it really existed.

After the rudder had been laid well amidships, the set screw (brake) had been tightened and the blade had been lashed with the rudder pendants, the vessel started on February 10 at 1.30 a. m. on her voyage to Hamburg. Pilot Siedenburg again took the direction of the vessel. As tugs had been engaged the tugs "Lankenau", "Eversand" and "Hoheweg".

The salvage steamer "Lankenau" is an iron vessel built [fol. 586] in 1906 at Elbing; the triple expansion engine develops 800 HP max. Master of the tug is Capt. Hinrich Klaassen, born June 8, 1875 at Lienen who holds a master's license for minor navigation (Baltic and North Sea and the English Channel) issued on March 16, 1926 at Elsfleth.

The tug "Eversand" is an iron vessel, built in 1925 at Wesermunde, her triple expansion engine develops 810 HP. Master is Capt. Johann Zey, born on Sept. 29, 1887 at Erfde (Schleswig-Holstein) who holds a master's license for minor navigation, issued on Sept. 24, 1926 at Elsfleth.

The tug "Hoheweg" is an iron vessel, built in 1923 in Papenburg. The engine power of the tug "Hoheweg" is given as 630 HP in the Handbook for the Merchant Marine, but her master, Capt. Heero Nannen, born on March 3, 1887 at Nordgeorgsfehn, holder of a master's license for minor navigation, submitted at the proceedings a certificate issued by the Germanic Lloyd showing that the engine has 1080 indicated HP. According to the declarations of the shipowner the contradictory indications arise from the fact that while the steamer was building, modifications were made having for purpose the increase of the number of HP, but they were not taken into consideration by the Handbook for the Merchant Marine. The Admiralty Court has not hesitated to accept the statement that the engine of the tug "Hoheweg" has 1080 indicated HP.

The tug "Hoheweg" made fast to the bow of the SS "Isis", with a towing connection of about 35 meters, while the tug "Lankenau" made fast to port and the tug "Eversand" to starboard. Special instructions were not given by

the Master of the SS "Isis" to the masters of the tugs. At first they received their orders by the whistle, then the [fol. 587] orders were called out to them, and partly they acted of their own accord.

With the tide coming in, and at first fairly strong and later light S wind, the voyage down the river Weser was started at 1.45 a. m., the steamer carrying the regulation two red lanterns prescribed by art. IV of the Sea Rules of March 31, 1927. The draft was at bow 18′ and at stern 23′; the level at the water gauge of the Industry Harbor showed 1.40 m. Below Moorlosen Church they passed without any difficulty two dredges and shortly below the two dredges meeting a larger steamer. In order to make possible a good passing of the steamer, the SS "Isis," which so far held fairly the middle of the fairway, had to go a little to starboard. According to the statements of several witnesses, particularly according to the declaration of Capt. Krüger, the vessel tended during the entire passage to swing toward starboard although the maneuvers of the two tugs were supported by the engines of the SS "Isis". The speed was moderate. According to the statement of the Chief Engineer Fuhrmann supported by the abstract of the Engine Logbook submitted, the port engine had to go astern much more frequently than the starboard engine, and this tends to confirm the statements of the witness that the vessel tended to swing to starboard.

Between kilometers 17 and 18 the lay of the fairwater made it necessary to change the course to port. Although the port engine gave "full speed astern" and the starboard engine "full speed ahead" and the tug "Lankenau" worked "full speed astern" and the tug "Eversand" "full speed ahead" and the tug "Hoheweg" did her best to pull to port, [fol. 588] it was not possible to get the vessel into the intended direction, although the swing to starboard was somewhat offset.

Immediately after passing the Lesum beacon at 4.15 a. m. the vessel grounded near the Vegesack landing bridge. In spite of utmost exertion of her own engines and of the tugs, all efforts to free the vessel remained fruitless. As a matter of fact the vessel swung more and the tide current shoved her on the ground athwart of the Lesum. The tide current was unusually strong and the wind also came from athwart. The tugs "Brake" and "Geestemünde" were

then engaged, but even then it was not possible to float the vessel, although powerful attempts were made up to 7.45 a. m. In fact the tide current drove the vessel more on the shore. When she grounded the water level was 2.80 m. and at 6.15 a. m. 3.40 m. As the vessel had grounded at an exceptionally high water level and it could not be expected that the next tide would reach the same height, a lighter was ordered by 'phone from Bremen and 131.5 tons of cargo were discharged. At the next tide the efforts to float her were resumed, after further tugs of the Schuchmann SS Co had been engaged. The direction of the floating manoeuvers had been taken by river pilot Schmidt, sent from Bremen at the request of the Master, as evidently pilot Siedenburg had been unnerved by the events. As Bremerhaven reported a water level of 3.80 m., the Master calculated on a maximum level of 2.80 m. which was 0.60 m. less than that of the preceding tide.

At about 12.50 p. m. a loud report was heard. It was found that the deck had cracked over a length of about 1 meter at the afterend of No. 3 hatch on the starboard side and that the plates of the outer skin had buckled. A later [fol. 589] investigation showed that the vesel had buckled at the bottom and had strained in her strengths. Photographs were taken of the damages and they were submitted at the proceedings.

After engaging further two tugs belonging to the North German Lloyd, there were altogether 16 tugs assisting and forcing her own engines to the utmost, the vessel managed to float off at 6.45 p. m. According to the soundings taken by the ship's officers and by Mr. Landmark C. E. sent by the Department of Navigable Waters, the vessel had been fast from her bow to the afterside of No. 2 hatch, while the afterpart of the vessel was free. According to the sounding chart there was a sandbank under amidships. Witness Landmark put the result of his soundings in a chart which has been filed with the acts. It shows that at the site where the SS "Isis" lay, the depth at high water is amply 5 meters; the extreme height of the bank under the vessel was to the W from the middle of the bank. At the stern of the SS "Isis" she had at high water 11 meters and at low water about 8 m. While she was fast it was noticed that in some places at the forepart of the vessel, the water coursed below her keel.

During the attempts to float the vessel, the engines of the SS "Isis" were driven to the utmost. According to the statement of Chief Engineer Fohrmann the damage to the engines is such as to make it necessary to overhaul the entire machinery. Both propeller shaft pipes had become hot through the sand and mud that had gotten into them. The stern tube flanges and stern glands have also suffered exceedingly through sand and mud getting into them. The cooling apparatus of the main and auxiliary engines became so full of dirt that the cooling of the cylinders and [fol. 590] pistons failed partially during the use of the engine although all circulation pumps were used. Due to the straining of the vessel No. 3 tank and hold got leaky. However it was possible to clear the water by means of the ballast and the two bilge pumps without having recourse to the pump steamer that was ready alongside.

The total damage sustained by the vessel amounts to about Rm. 300,000.

After the vessel had floated, she returned to Bremen aided by six tugs and reached there without any further incidents. When she was docked there. the back pieces of the rudder were said to have stood several degrees to starboard, but the point has not been fully cleared up by the investigation.

At the main proceedings before the Admiralty Court it was unfortunately impossible to question the river pilot Siedenburg as shortly before the proceedings he met, in the exercise of his profession, with an accident resulting in his death. In judging the facts of the case brought out at the main proceedings, and as far as concerns the accident on February 6, 1928, the Admiralty Court agrees with the Federal Commissioner that no fault has to be attributed to the master.

The fog setting in suddenly made it necessary to anchor. It was good judgment to keep the head of the vessel upstream in order to prevent the swinging of the vessel, as the tide was about to turn and the manoeuver is justified from a nautical standpoint. While she was at anchor, all precautionary measures called for from a nautical standpoint were taken and the legal prescriptions were observed, as she continually gave the signals of a vessel at anchor, placed a seawatch and an adequate look-out. Soundings [fol. 591] were taken also immediately after anchoring.

The Master decided to anchor only after the pilot and the tug masters, who were familiar with the reaches of the river, had assured him that there was no danger for the vessel in anchoring there.

After the vessel grounded and then got off by her own power, she was caught by the wind blowing athwart and the strong tide current, so that in spite of all measures taken it was not possible to hold the vessel. Both, the grounding while at anchor and the striking against the E shore, must be attributed exclusively to force beyond control and no fault attaches to anyone. On this occasion the back pieces of the rudder were evidently twisted and this explains the tendency later shown by the vessel to swing to port (sic, should be starboard).

The attorney of Capt. Krüger has pointed out that in his opinion it would be advisable to make the use of tugs obligatory for vessels of the size of the SS "Isis", and this after leaving Bremerhaven. Attorney Ehlers suggested that in its decision the Admiralty Court should strongly point out this necessity. After maturely examining the facts, the Admiralty Court is unable to give heed to the suggestions of Attorney Ehlers. According to the "Instructions for the Weser Pilots concerning the piloting on the river Weser" issued by the Senate Commissioner for Navigable Streams at Bremen on Dec. 6, 1922, the pilot has to recommend to the master of the vessel to employ a tug for the stretch from Bremerhaven to Vegesack, "if the circumstances, particularly when going upstream, make it appear desirable". In the opinion of the Admiralty Court this provision is quite sufficient and affords the necessary safety for navigation on the river Weser. It leaves it to [fol. 592] the pilot who is familiar with the river, whether he should recommend to the master to employ a tug or not. In this particular case it seems that it was not at all necessary for the steamer to accept a tug; far greater vessels than the SS "Isis" ascend the river up to Vegesack without the assistance of tugs and find no difficulties. This usage has not led to any complaints or to an endangering of navigation. The pilot could waive the use of a tug all the more as the weather was fine when passing Bremerhaven. The lack of obligation to use tugs was not the cause of the accident in this case, as two tugs were present when she floated. Such accidents cannot always be avoided, even when tug assistance is present.

As to the second accident, it had to be examined first whether the Master was open to a reproach because he started the voyage with a vessel considerably handicapped in her steering capacity due to the existing damage to the rudder. This must be answered in the negative, in the opinion of the Admiralty Court. The motor ship "Isis" has twin propellers which fact alone gives a certain steering capacity to a vessel with a damaged rudder. In addition to this, the Master had engaged three tugs developing altogether about 2700 HP. Of these tugs the strongest, i. e. tug "Hoheweg" developing 1080 HP, had made fast to the bow where the strongest tug was needed, while the other two tugs were properly moored to both sides of the vessel. It must be admitted therefore that no fault was committed with regard to number and power of the tugs.

No reproach can be made to the masters of the tugs regarding their activity. Capt. Krüger and another witness stated at the proceedings that they had gained the impression as though the tugs had not always made use of their [fol. 593] entire engine power, and this reproach is particularly directed against the master of the tug "Hoheweg". The tug masters have declared on oath that they always speeded their engines to the utmost when this was necessary, and Capt. Nannen of the tug "Hoheweg" was very emphatic in his statement. The Admiralty Court sees no occasion to doubt their statements, and it is certainly not clear why the tug masters should have acted differently.

There should have been no hesitation in starting the voyage with a vessel so equipped and aided. It may be pointed out that flotilla tows disposing of much less steering and motion capacity, navigate the river Weser without endangering navigation or themselves, for instance pontoons, cranes, etc. which have no engine of their own. There is nothing extraordinary in starting such voyages and it can never be avoided. It must also be considered that the vessel was under a certain necessity to get to Hamburg as speedily as possible because part of her cargo was destined for that port.

The Admiralty Court thinks, however, that it would have been better if the vessel had started the voyage in the day time and accomplished the entire passage during daylight, if possible, because in taking a vessel handicapped to some

extent the risk always existing is naturally much less while proceeding with daylight than at night.

It is also open to blame that Capt. Krüger did not insist on seeing the certificate of seaworthiness before he started on his voyage, because according to Paragr. 513 of the Code of Commerce he is responsible for it that the vessel starts her voyage in a seaworthy condition. Whether such a certificate of seaworthiness existed at all, and in what form could not be properly found out at the Court proceed- [fol. 594] ings, as has already been explained.

In judging all the facts of the case, it must be borne in mind that the steering capacity of the entire flotilla was naturally curtailed firstly because there was relatively little water under the keel and then because the four vessels connected with each other formed a unit and developed only a slow speed. Furthermore during the passage from Bremen to Vegesack the SS "Isis" evidently tended to swing to starboard. The reason for this has not been quite found beyond all objection. Apparently the master did not notice this swinging to starboard because the bend of the fairway was at first in the same direction, Witness Capt. Bey, master of the tug "Eversand" has testified that he did not at all notice this swinging to starboard of the SS "Isis". The Admiralty Court does not connect this swinging of the vessel with the fact that later, when docking the vessel, it was found that the back pieces of the rudder stood a few degrees to starboard. As it appears from the testimony of witnesses that the SS "Isis" left the dock of the Weser Company Ltd. with the rudder well secured and standing amidships, it is to be supposed that the twist in the rudder was caused only through the grounding at Vegesack.

After passing the Lesum beacon, the river bends to the W so that it is necessary to alter the course to port. In spite of all the engine manoeuvers of the SS "Isis" herself and the corresponding manoeuvers of the tugs it was not possible to get the steamer on her proper course. This must be attributed to the fact, as already explained, that it was very difficult to make the SS "Isis" swing to port and that she was caught by the NW wind prevailing on the day of the accident and the particularly heavy flood tide on that day and thus ran aground with her bow. As the SS "Isis" [fol. 595] was fast immediately before the mouth of the

Lesum and part of the tide current flows into the Lesum, and this according to the statement of the expert witness Plate, Director of Navigable Waters, with far greater velocity than the tide current flowing up the river Weser, it was but natural that the SS "Isis" was driven more and more before the mouth of the Lesum.

No fault attaches to the Master for this accident, either. It must be attributed to the coincidence of several unfavorable circumsances—limited steering capacity of the vessel, strong wind coming almost from athwart and an exceptionally strong tide current running against the vessel at an unfavorable site.

According to Paragr. 4 section 3 concerning the investigation of sea accidents it had to be found out whether there were defects in the fairway, the more so as the attorney for Capt. Krüger raised objections in this connection for the excuse of the Master. It must be left undecided whether the notion "defects of the fairway" in the sense of Paragr. 4, section 3 relates to the natural condition of a fairway, and it must be borne in mind that there are favorable fairways and less favorable fairways or whether the word "defects" relates only to defects that can be mended such mending falling under the duties of a proper department of river navigation. The tenor of Paragr. 4, section 3 of the Sea Accident Law and the enumeration therein of the points to which the investigation has extended, point, in the opinion of the Admiralty Court, to the latter interpretation. But apart from this question the fairway in question entirely satisfies the demands that can be made of it as according to the testimony of Mr. Plate, Director of [fol. 596] Navigable Waters, the original width of 100 meters has been increased to 140 meters. No exception can therefore be raised under this head.

As to the measures taken after the accident, they were entirely proper and adequate. It must be admitted all such measures were energetically taken as it appeared necessary to float the vessel as quickly as possible.

(Signed) Dr. Koch. (Signed) J. Wuhrmann. (Signed) Schmidt. (Signed) Johnsen. (Signed) Scholtz.

For true copy:

(S) Illegible, Inspector of the Admiralty Court.

(Seal Admiralty Court, Bremerhaven.)

LIBELLANT'S EXHIBIT 11

Excerpt from Log (Deck) of Motorship "Isis"

L. entry on left hand page; all others are on right.

P. 92

February 6, 1928.

Time: 12.06 A. M. Changed pilots near Bremerhaven. Pilot Sladenburg on board. (L.) Courses by pilot's instructions.

[fol. 597] 1.33 A.M. Passed Brake; are proceeding at slow speed.

2.00 A.M. Passed Hunte River mouth.

2.20 A.M. Anchored above Elsflather Sand because of dense fog. Starboard anchor out. 30 fathoms of chain, 10 meter water. Gave fog-signals according to Regulations. Anchor lights are burning bright.

Duration of voyage: 21 days 13 hours 53 minutes.

Distance travelled: 5,158 miles.

Average hourly speed: 10 miles.

7.00 A.M. Clearing up. Waiting for high water.

(L.) 9:00 A.M. Aground at anchor (Kilometer 27.5).

Soundings at low water 11 A.M.

Forward (centerline) 3 fathoms.

No. 1 Hold Port 5 fathoms, Starboard 3 fathoms.

" 2 " " 5.2 " " " 3 "

" 3 " " 5.0 " " " 3 "

" 4 " " 5.1 " " " 4 "

Aft (centerline) 5 fathoms.

(L.) 12:30. Aground at Anchor.

12:47. Ship comes free suddenly and swings.

On February 6, after we had passed Bremerhaven at 1:16 A. M. and Brake at 2:33 A. M., it became necessary to drop anchor at 2:20 A. M. because of dense fog, near Elsflather Sand and Blumenthal, using the Starboard anchor and 30 fathoms of chain in a sounded depth of 6½ fathoms. The engines were kept ready for quick usage continuously. The [fol. 598] fog came up rather rapidly so that it was impossible to make out any lights or landmarks in anchoring. The ship's exact position was located as soon as it cleared up at 7:00 A. M. and it was found that the anchor was lying in the channel and that the ship was forced against the

westerly riverbank by the current near Kilometer 27.5, which, owing to the heavy fog, could not be noticed before. The bow of the vessel was in 18 feet depth. Attempts were made to free the ship immediately with her own power, but this was found to be impossible. The heavy outgoing tide put the ship up higher and all further attempts to free her were absolutely hopeless.

The soundings taken at low water at 11:10 A.M. were as follows:

Forward (Stem) 3 fathoms.

Hold	I,	Port,	5	fathoms;	Starboard,	3	fathoms.
"	II	"	5.2	"	"	3	"
"	III	"	5	"	"	3	"
"	IV	"	5.1	"	"	4.9	"

Aft (amidships) 5 fathoms.

In the meantime the two tugs "Rotesand" and "Ronneback" arrived and made fast alongside.

P. 93, left

(L) According to calculations and the opinion of Pilot Siedenburg and the two towboat captains, the ship should come free at about 2:00 P. M. The captain asked the pilot repeatedly if there was any danger for the ship in the momentary situation and if the ship could through her momentary position suffer any damage, but the pilot and both the tugboat captains viewed the situation without alarm. At about 12:15 the second officer confirmed that [fol. 599] the ship's bow was still in 19 feet depth, in other words still 4 feet below actual draft. At 12:47 the ship slid suddenly into deeper water, so that it came free from the bank. At that time the captain, the first and second officer and the pilot were on the bridge and the 3rd officer was standing by at the anchor. The ship's stern was then swung around with terrific force by the heavy flood tide, which was made worse by a wind blowing against her beam (WSW force 5). Immediate signals given to the engine room—Port Engine half Astern and Starboard Half Ahead, but the motors ignited with difficulty. At first both motors started, though immediately afterwards the Starboard engine refused service. The port engine kept going, but it

could not hold the ship against the current. The assistance of the two towboats alongside was asked immediately. Due to the rapid turning motion of the ship, the two towboats could not go into action in time to catch the fast swinging ship. Because the water was not high enough as yet to let the ship swing around in the narrow channel, she ran with her stern forcibly against the easterly bank and went aground. After several attempts she was got free by using the engines and the two tugs pulling at the stern.

P. 93, Right

As the ship sheered strongly and continually swung to ward Starboard, the assistance of three additional tugs ("Ueberall", "Eversand" and "Lankenau") had to be accepted to avoid another grounding or collision with vessels coming from the opposite direction. Even for these five towboats it was very difficult to hold the ship in the channel [fol. 600] and the ship's own machinery had to be used in addition right along. Because of the heavy sheering of the ship toward starboard and because the steering engine motor commenced to get warm, it was assumed that the rudder stock was damaged. The real damage could not yet be determined. Under assistance of the 5 tugs the ship was brought to the entrance of the Harbor, where three towboats cast off and the tow boats "Roemebeck" and "Lankenau" brought the ship to the pier, shed 11, where she was fast at 9:20 P.M.

Draft: Forward 23'3"; Aft 23'5".

Bilges before and after grounding dry.

Engines were both run to their limit.

February 6, 1928, 9:20 P. M. fast alongside shed 11. Authorities received us at once. Began to discharge with one gang during the whole night. Pumps clean (i. e., bilges dry). Light rain showers. Draft: 23'3" Forward 23'5" aft. Fuel: — Drinking water 15 tons. Watch in the holds and on deck by the ship's watch. At night 1 officer and 1 man on watch.

Bremen, February 7, 1928.—Four gangs at work. Watch in all holds. In the afternoon the diver from the shipyard arrives to determine the damage done to the rudder. Nothing could be located. Four gangs worked from 7:00 A.M. to 5:00 P.M. 1 Gang at work during the whole night.

Upon discharging in #1 Hold it was found that sweat

water was in the hold and several bags of coffee were damp. These sacks were lying on top and near the hatch overhead well covered with mats and paper. The sweat water penetrated the paper and soaked it. The ventilators of #1 hatch were covered several times during the voyage owing [fol. 601] to the bad weather. At night 1 officer and one man on watch; pumps clear.

Bremen, February 8, 1928. Fine rain, wet weather. Four gangs at work until 5 P M, then 8 gangs until 2:00 A M 1 gang until 5:30 A M February 9, 1928. Watch in holds and on deck by ship's watches. Crew washes paintwork. At night 1 officer and 1 man on watch. Pumps clear.

Bremen, February 9, 1928. Stormy, wet weather, later on clearing up. Shifting ship further along the dock. Crew makes ship sea clear. Everything prepared to go into dock. 4:18 P M ship in dock under assistance of tugs "Hoheweg", "Eversand", "Roennebeek" and "Blexen". Ship was raised only enough to be able to determine where the damage was done. The rudder was put amidships, brakes turned on and lines made fast and hauled tight.

Draft: 18'6" forward 23'3" aft.

P. 94

February 10, 1928. 1 a.m. Pilot Siedenburg on board.

Dock was flooded (ship had been in drydock). 1:30: Ship was afloat.

Tugboats "Lankenau" and "Eversand" made fast alongside.

Tugboat "Hoheweg" made fast ahead.

(L) According to pilot's instructions steamed with the use of both the ship's engines with assistance of the three tugboats down the Weser.

(Bilges) Dry. Wind southwesterly, force 3. Uffers, watch officer,

[fol. 602] 3:52: Ship went aground at Vegesack in front of the mouth of the Lesum.

(L) 8 a. m.; Wind southwest, force 2; weather clear.

9 a. m. Wind west southwest, force 3. On the bottom at Vegesack across the mouth of the Lesum.

Soundings at the point of grounding at low water

Stem (forward) 2.60 mtr.

Hold #1 Port, 5.20 mtr; Starboard 5.20 mtr.
" #2 " 5.10 " " 5.20 "
" #3 " 2.90 " " 2.40 "
Near engine room port 4.95 mtr. " 5.50 "
Hold #4 Port 6.20 mtr. " 8.20 "

9:00 AM Aground near Vegesack; mouth of Lesum River. Wind W.S.W. force 3.

Draft leaving Bremen: Forward 18'6" Aft 23'3"

Discharged cargo into lighter:

Various marks: 1100 bags of coffee—86 tons.
470 sacks of prunes—40 tons.
177 cases of dried frt—3.5 tons.
27 sacks of flour } 2 tons.
9 sacks of flour }

Total 131.5 tons.

At 1:00 P. M. Lighter "Klaaderadatch" alongside, discharged 131 tons of cargo.

At 6:30 PM under assistance of several towboats, all clear, returned to Bremen. At 9:10 made fast; ship alongside new pier. Going sea watches. Bilges sounded every 10 minutes. A slow rising of water mixed with fuel was noted. Pumps are working.

[fol. 603] LIBELLANT'S EXHIBIT 12

Engine Log

m/s Isis

Translation of Remarks Column

February 5-10, 1928

February 5:
"9.04 Attention—slow ahead.
9.06 Stop.
9.07 Full astern.
9.10 Stop.
9.15 Full ahead. Pilot on board."
"9.05 End of sea voyage."
February 6 (First Watch):
"Starboard engine

12 o'clock—attention—maneuvers.
.16 Full ahead. Change pilots.
1.26 Ahead half. Maneuvers in book.
2.44 Stop.

Port engine:
12 o'clock Attention.
.16 Full ahead.
1.26 Half ahead. Maneuvers in book until
3.04 Stop.
3.20 Engine finished, at anchor (fog).

Starboard engine:
7.25 Reverse full.
.30 Stop.
.32 Reverse full.
.42 Stop. Reverse full. Stop.
.44 Engine finished.

[fol. 604] On left hand page:

Port engine:
7.25 Reverse full.
.32 Stop
.36 Reverse full.
.38 Stop
.39 Reverse full.
.41 Stop
.42 Ahead full. Stop.
7.44 Engine finished.

Port engine:
12.48 Reverse half. Stop
.49 Reverse full
.50 Stop
.51 Reverse half. Stop
.52 Reverse full
.54 Stop
1.40 Reverse full
.43 Stop
.44 Ahead slow. Ahead full.
.45 Ahead slow. Stop.

Port engine continually maneuvering until 3 p. m.

4.40 Attention
.42 Ahead slow
.43 Stop
.44 Reverse full
.45 Stop

Continual maneuvering until 9.20 Engine finished. Secure in Bremen.
On the right hand page:
Starboard engine:
12.48 Ahead half
.49 Stop
1.07 Full ahead

[fol. 605] After repeated startings the injection air compression was low; also the starting air compression.

1.44 Slow ahead
.46 Stop

Fuel needle valve starboard V knocking.

2.16 Ahead slow
.18 Stop

Fuel needle valve cyl. V secured.
Valve opened up.

2.43 Ahead slow
.56 Stop
.58 Reverse full

Injection air at 12 atm. The engine does not fire any more.

4.40 Attention
.43 Ahead slow
.44 Stop

Continual maneuvers until 9.20 Engine finished
February 7, 1928—Bremen:
Working hours from 7 a. m. to 5 p. m.
Exhaust valves of cylinders 1, 2 and 3 port engine changed; of cylinders 1, 2 and 3 starboard changed.
Fuel injection valves—of cylinders 1, 2 and 3 port and cylinders 6, 5 and 4 starboard opened up, packing renewed, needle ground in and valve closed up again.
Right hand page:
Diesel II in operation
from 8.20 p. m. to 12 p. m. equals 2 hrs 40 min.
" 12 to 12 " 24 hrs.
[fol. 606] Auxiliary boiler in operation
from 6 to 12 a. m. equals 6 hrs.
" 2 to 10 p. m. " 8 hrs.

Watch—Third Engineer Block.
The engineering department continues sea watches.

February 8:
Left hand page:
Working hours from 8 a. m. to 5 p. m.
Exhaust valves—on cylinders 4, 5 and 6 change exhaust valves.
Diesel II—All air pump valves of 1st, 2nd and 3rd stages changed.
Auxiliary boiler—overhauled the injector.
Fuel oil valves—on cylinders 4 and 5 port and cylinders 3 and 2 starboard, the fuel oil injection valves were opened up, the packing was overhauled, the needle was ground in and the valves were closed up again.

Right hand page:

Diesel III in operation from 12 to 12 equals	24 hrs.
Auxiliary boiler in operation	
From 4 a. m. to 12 noon equals	6 hrs.
" 3 p. m. to 10 p. m. "	7 hrs.

Watch—Third Engineer Ruch.

February 9:
Working hours 7 a. m. to 5 p. m.
On cylinder 1 port the intake valve was opened up and the reserve valve installed.
On cylinders 5 and 4 starboard the exhaust valve was changed.
[fol. 607] On cylinders 6 port and 1 starboard the fuel oil valves were opened up, packing overhauled and needle ground in.
Fuel oil pumped up.
Air and cooling water systems tested.
389.91 tons of fuel oil, 11,179 kg. of enging oil on hand.

On right hand page:

The ship was hauled at 6.18 p. m. into Dock V of the A. G. Weser.
The ship was raised on the dock, for the purpose of sighting the rudder damage.

The dock was lowered and the ship left the dock at 1.45 a. m.

Diesel II in operation from
12 to 12 equals 24 hrs.
Diesel III in operation from,
6 a. m. to 8 p. m. " 14 hrs.
Auxiliary boiler in operation from
6 a. m. to 12 noon " 6 hrs.
2 p. m. to 11 p. m. " 9 hrs.
On watch—Fourth Engineer Schemme.

February 10, 1928—15th voyage from Bremen to Hamburg:

Left hand page:

Port engine:

1.33 Attention.
.50 Reverse half.
Continual maneuvering until
7.42 Reverse full
.45 Stop.
7.51 Engine finished.
3.51 a. m. Ship sits on bottom.

Compressor pressures "various".

[fol. 608] 12.50 p. m. Ship breaks to the starboard side on the upper deck.

Port engine:

5.18 Attention.
5.23 Reverse slow.
5.24 Reverse full.

Continual maneuvering until

9.07 Ahead slow, stop.
9.08 Ahead slow, stop.
9.13 Engine finished.

Fast at pier in Bremen.

Right hand page:

Ship came out of the dock at 1:45 a. m.

The cooling water and oil temperatures are various.

Starboard engine:

1.33 Attention.
1.51 Ahead slow.
Continual maneuvering until
7.42 Reverse full.
7.45 Stop.
7.51 Engine finished.

Afterpeak pumped out.

1 p. m. Hold 3 port and starboard, as well as tank 3 port and starboard, leaking.
Were able by pumping to keep down the water.
6.30 p. m. Ship afloat.

Starboard engine:

5.18 Attention.
5.23 Reverse slow.
5.24 Reverse full.

Continual maneuvering until

9.06 Reverse slow, stop.
[fol. 609] 9.07 Reverse slow, stop.
9.13 Engine finished.

On the main motor the cooling system did not function. The same happened to the auxiliary engines.

Diesel I in operation from 1 p. m. to 12 p. m.	equals	11 hrs.
Diesel II in operation from 12 to 10 p. m.	"	22 hrs.
Diesel III in operation from 12 to 11 p. m.	"	23 hrs.
Auxiliary boiler in operation from 5 a. m. to 11 p. m.	"	18 hrs.

February 11, 1928—in Bremen:
Left hand page:

In the morning continued sea watches on account of tank and hold leaks.
Attended to cleaning up work.
From 12 noon discontinued sea watches; continued day watches.

Right hand page:

4.30	a. m.	Hold 3 port pumped out.
10	a. m.	Hold 3 port pumped out.
4	p. m.	Hold 3 port and starboard pumped out.

[fol. 610] RESPONDENT'S EXHIBIT 1

(Translation)

February 9th, 1928.

The Verein Hamburger Assecuradeure, Hamburg.

GENTLEMEN:

m. s. "Isis": Accident on River Weser

Enclosed herewith please find copy of the report on the accident above referred to drawn up by the captain.

The m. s. "Isis," with the Hamburg and Antwerp cargo still on board, will proceed to a Bremen dock this morning, but will only be raised so far that her rudder can be placed amidships and wedged accordingly. In order to save the considerable dock expenses and the cost of discharging and reloading her cargo at Bremen, we have decided that the vessel—as already discussed with Mr. Dahlström—shall be towed from Bremen to Hamburg, using her own engines. Last night we invited several tenders for the job, in pursuance of which the Unterweser Reederei A. G., of Bremen, received our order for conveying the vessel to Hamburg, using the two tugs "Hoheweg" and "Eversand," at a price of Marks 3,000—, this being the most favorable offer tendered to us. The ship will probably leave Bremen this afternoon or this evening and may be expected to arrive at Hamburg tomorrow. Kindly appoint an expert to ascertain the damage sustained. This gentleman will then get into contact with our engineer, Mr. Schubert.

In connection with this accident we shall ask the sworn [fol. 611] average adjusters, Mr. Alfred Schmidt and Dr. E. Prosch, to adjust general average in Hamburg.

Your very truly,
Hamburg-Amerika Linie, Insurance Department.
(Sgd.) Warns.

Enclosure.

Respondent's Exhibit 1A

(Translation)

Extract from the Log of the German-owned m. s. "Isis"

(Page 93)

Port of registration: Hamburg.
Captain: Paul Krueger.
International code signal: RCQW.

Having passed Bremerhaven at 1.16 a. m. on February 6 and Brake at 2.33, we were obliged—owing to dense fog—to cast anchor at a sounded depth of water of 6½ fathoms between Elsfleth Sand and Blumenthal, using starboard anchor and 30-fathom chain for this purpose. The engines were kept ready all the time for immediate use. The fog had arisen very suddenly, so that—when casting anchor—we could not make out the lights or the marks on shore. When the fog lifted at 7 a. m., the position of the ship was ascertained at once. It was found that the anchor was cast in the fairway and that, owing to the current in the star- [fol. 612] board direction, the ship had been pressed against the western bank near Kilometer 27.5, this fact not having been noticed previously owing to the prevailing fog. The vessel's bow rested on 18 feet of water. We tried at once to get away by means of our own engines, but failed to do so. In view of the fact that the ship, owing to the strongly receding tide, settled still further in her position, all attempts to get away were doomed to failure. The following soundings were made at 11.10 a. m. at low water:

Fore part (stem): 3 fathoms

No. I	Hatch: Port	5	fathoms
No. II	" "	5.2	"
No. III	" "	5	"
No. IV	" "	5.1	"
No. I	Hatch: Starboard	3	fathoms
No. II	" "	3	"
No. III	" "	3	"
No. IV	" "	4.9	"

Stern (amidships): 5 fathoms

Meanwhile the two tugs "Rotesand" and "Roennebeek" had arrived and had made fast alongside. The pilot, Mr. Siedenburg, and the captains of the two tugs thought that, according to their calculations, the ship would be able to get away again about 2 p. m. The captain repeatedly asked the pilot whether the position of the ship, as it then was, could cause any danger or any damage to her. Neither the pilot nor the tug captains had any apprehensions on that score. About 12:15 p. m. the second officer ascertained that the bow of the ship still rested on 19 feet of water, that is, 4 feet less than her proper draught. At 12.47 p. m. the [fol. 613] ship suddenly slid into deep water, thus losing contact with the shore. At that time the captain, the first and second officers, and the pilot were on the bridge, whereas the third officer was attending to the anchor. In consequence of the strong current of water the stern of the vessel was thrown about with great violence, things being made considerably worse by the cross wind from West-Southwest, force 5. The port engine was immediately ordered astern and the starboard engine ahead. In response to these orders, the engines started with difficulty; and, although both of them began to work, the starboard engine stopped immediately afterwards. The port engine continued in operation, but could not hold the ship against the current. The two tugs lying alongside were immediately asked for assistance; but as the ship turned round exceedingly rapidly, they could not commence operation in time and could not neutralize the violent turning movements of the vessel. As the water had not yet risen high enough to enable the ship to swing about freely in the narrow fairway, her stern violently collided with the eastern shore and she ran aground. After prolonged efforts it became possible to get her clear with the aid of her engine and the two tugs pulling from astern. Seeing, however, that she yawed considerably and that she shore off towards starboard all the time, the assistance offered by three additional tugs—"Ueberall," "Eversand," and "Lankenau"—had to be accepted, so as to prevent the vessel from running aground again or colliding with ships proceeding in the opposite direction. Even the five tugs thus employed had very great difficulty in keeping the ship within the fairway, and the ship's own engine had to be used all along.

[fol. 614] The constant sheering-off of the vessel towards starboard and the fact that the rudder engine had run hot, suggested that the rudder post had been broken. Up to now, however, it has not been possible to ascertain the real damage. With the assistance of the five tugs the ship was conveyed to the harbor entrance, where three of the tugs were cast off. The tugs "Roennebeck" and "Lankenau" brought her to her berth at Shed No. 2, where we made fast at 9.20.

Draught: Ahead—23'3"; astern—23'5". The bilges were free of water before and after grounding. Both engines were strained to the utmost extent of their capacity.

(Sgd.) Krueger, Captain.

RESPONDENT'S EXHIBIT 3

(Translation)

Hamburg, July 3rd, 1928.

Verein Hamburger Assecuradeure, Messrs. Hamburg-Amerika Linie, Hamburg, Ferdinandstrasse 58.

GENTLEMEN: You have advised us that you have received the following telegram from the shippers and underwriters of the San Francisco cargo of the m/v "Isis":

"Sanfrancisco underwriters and shippers today libeled in [fol. 615] personam agents and Hapag also attached Hapag funds alleging Isis unseaworthy leaving Bremen therefore average unjustified stop Legal response required by July 10th I arrive Sanfrancisco Saturday intend asking delay pending receipt your letter advises cable sudden anything specially meantime.

Ebey.

We hereby declare that the voyage of the m/v "Isis" from Bremen with fixed rudder was approved by the Havarieausschuss (average committee) of our association, dealing in this case for the hull-underwriters and the underwriters of the cargo represented by our members and we further declare that there had been especially no objections in this respect as also the representative of the German-

isoher Lloyd approved the trip to Hamburg, it being considered that the vessel was sufficiently seaworthy for the trip to Hamburg.

Yours faithfully, Verein Hamburger Assecuradeure. (Sgd.) Schues, Chairman. Hinr. Gaede, Deputy Chairman. Dahlstrom, Managing Secretary.

[fol. 616] RESPONDENT'S EXHIBIT 4

(Translation)

Verein Hamburger Assecuradeure

Hamburg, July 3rd, 1928.

Messrs. Hamburg-Amerika Linie, Ferdinandstrasse, Hamburg.

GENTLEMEN: You have advised us that you have received the following telegram from the shippers and underwriters of the San Francisco cargo of the m/v "Isis":

"Sanfrancisco underwriters and shippers today libeled "in personam agents and Hapag also attached Hapag funds "alleging Isis unseaworthy leaving Bremen therefore "average unjustified stop Legal response required by July "10th I arrive Sanfrancisco Saturday intend asking delay "pending receipt your letter advises cable sudden anything "specially meantime. Ebey."

We hereby declare that the voyage of the m/v "Isis" from Bremen with fixed rudder was approved of by the insurers of the hull and that these latter did not object to such trip, more particularly so because the Germanischer Lloyd representative had already approved of it, it being considered that the vessel was sufficiently seaworthy for the trip to Hamburg. We submit this statement on behalf of [fol. 617] the Average Committee of our Association, which was in charge of this matter.

Yours faithfully, Verein Hamburger Assecuradeure. (Sgd.) Schues, Chairman. Hinr. Gaede, Deputy Chairman. Dahlstrom, Managing Secretary. (L.S.)

(The remaining parts of the original document are in English:) Es folgt nur die Beglaubigung-sklausel.

Respondent's Exhibit 5

Certificate

(Translation)

Germanischer Lloyd, Schiffs-und Maschinen-Inspektion für Bremen-Vegesack

Bremen, June 26th, 1928.
Donshof 26.

The rudder of the motor vessel "Isis," of the Hamburg-Amerika Linie, had been twisted so considerably owing to the vessel running aground in the Weser River in February this year that it could no longer be used.

Director Reichenbächer intended to fix the rudder in the midship position and to convey the vessel to Hamburg by means of three powerful tugs. Both engines were in proper order and might be used to contribute towards the steer-[fol. 618] ing of the vessel, as the latter is fitted with two propellers.

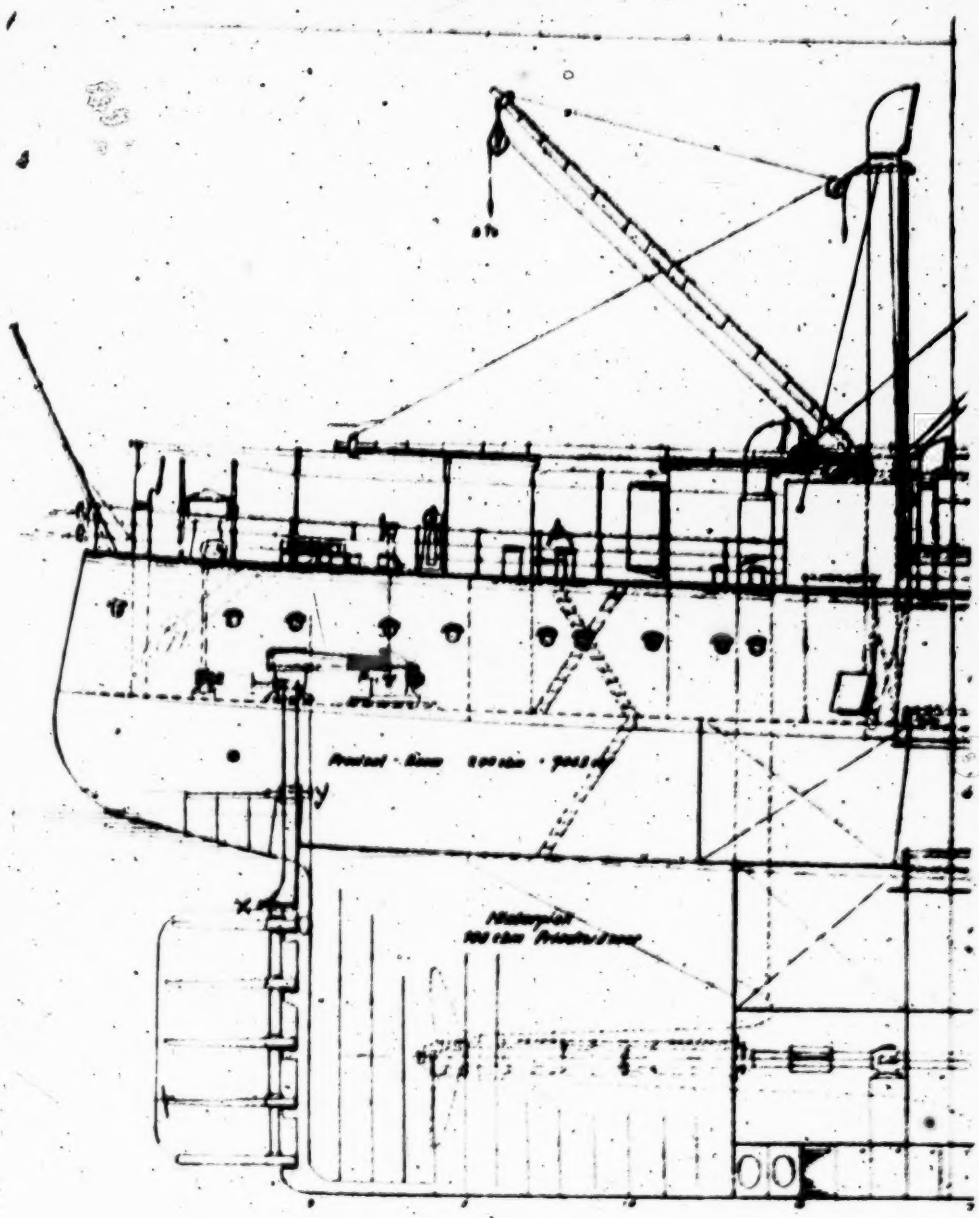
I hereby certify that I had no objections to the conveyance of the vessel by three powerful tugs and with the aid of the vessel's own engine power; because it could be assumed that, provided that the vessel was carefully navigated, the three tugs would be sufficient for steering her, more especially so, because the steering effect of the two propellers could also be utilized.

Bremen, June 26th, 1928.

Germanischer Lloyd Schiffs-und Maschinen-Inspektion Bremen. (Sgd.) Julicher.

(Here follow side folios 619, 620, 621 and 621a)

Respondent's Exhibit 6
(PHOTOPRINT)



1961

Respondent's Exhibit 7

(PHOTOPRINTS)

(For the Convenience of Court and Counsel this Exhibit is Bound in on the Opposite Page.)

Ulm 10. 2. 1928 ami.

133.	Kühl	133	Kühl
50	R.H	50	R.H. V.L.
52	H - R.H	52	H
55	R.L	54	V.H
52	R.V.	55	V.V.
58	R.H.	52	V.H.
59	H.H	58	V.L.
2	H	8	V.L. - H.
6	V.L	5	V.L
2	H.	22	H - R.V.
10	R.H - H	9	H.
11	V.L.	10	V.L.
12	H.	12	H.
18	R.H.	18	R.L.
17	H.	19	H.

22 R.L.	25 V.L.
23 Hpt.	26 Hpt.
24 V.L. - Hpt.	27 V.L.
	28 Hpt.
	29 V.L.
	30 Hpt.
	32 V.L. - Hpt.
	35 V.L.
	36 Hpt.
	37 V.L.
	38 Hpt.
	39 V.L.
40 V.L. - Hpt.	40 Hpt.
	41 V.L.
43 V.L. - Hpt.	42 Hpt.
44 R.L.	44 V.L.
45 Hpt.	45. Hpt.

46 V.L. - Hpt.	50 V.L.
53 V.L. - Hpt.	51 Hpt.
	54 V.L.
	55 Hpt.
	57 V.L. - Hpt.
	3 4 V.L. - Hpt.
	8 V.L.
	9 Hpt.
	12 V.L.
	13 Hpt.
	14 V.L.
	15 Hpt. - V.L.
3 16 V.L.	16 Hpt.
17 V.L. - Hpt.	17 R.L. - Hpt.
18 R.V. - Hpt.	18 V.L. - V.H. -
20 V.L.	
21 Hpt.	
25 V.L. - Hpt.	26 V.L. - Hpt.
	27 V.L. - Hpt.

621a

4961

[fol. 622] RESPONDENT'S EXHIBIT 17

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LOUIS H. MAY, Libellant,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT, Respondent,

and other similar causes pending in the above Court

It is hereby stipulated and agreed that the engineers of the Isis who were in charge of the port and starboard engines, respectively, would testify, and shall be deemed to have testified, that, on the 10th day of February 1928, from the time of leaving Bremen until the vessel stranded, they operated the engines at the times and in accordance with the orders recorded in the maneuver book which is in evidence as Respondent's Exhibit 7.

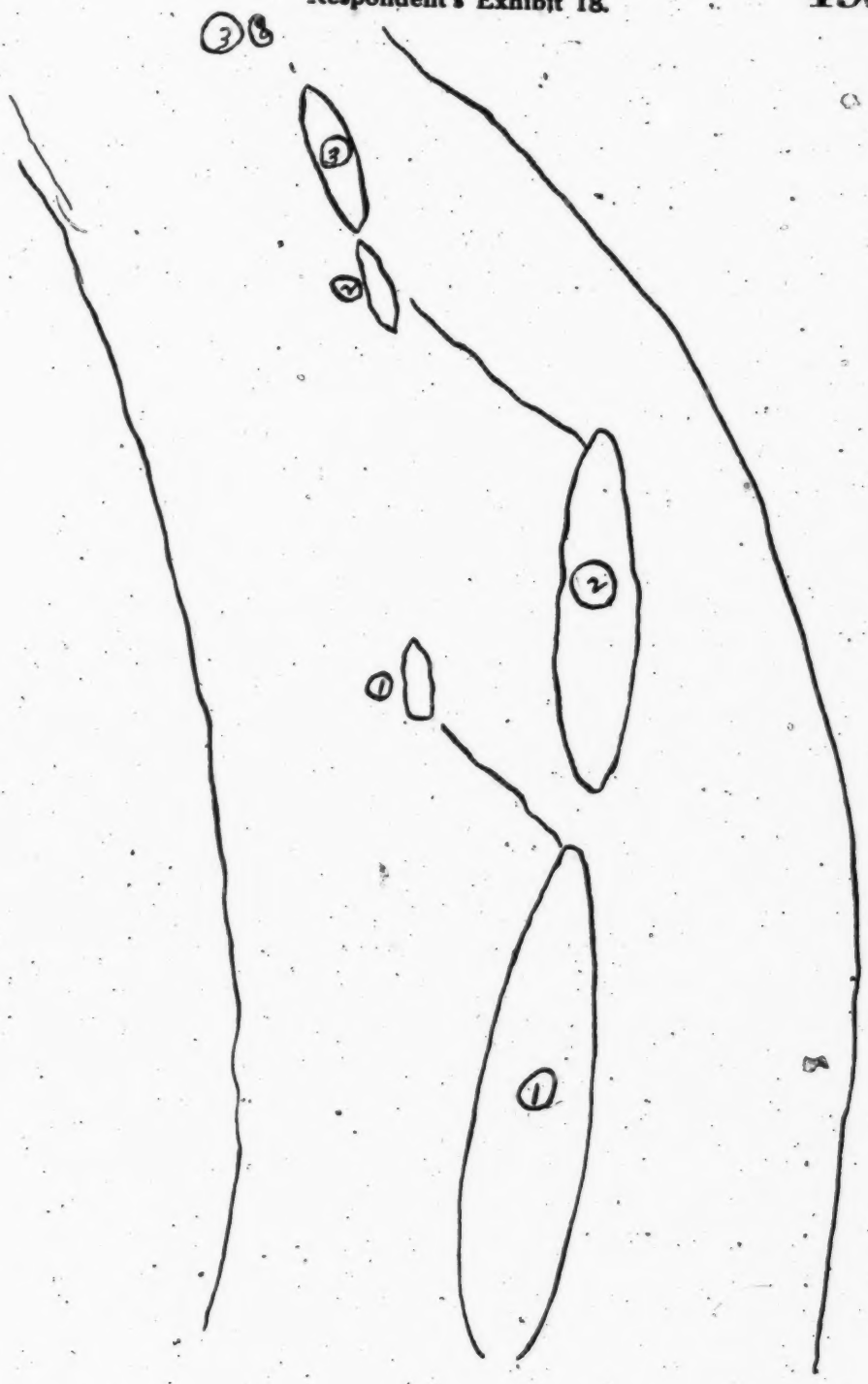
Dated October 23, 1930.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Haight, Smith, Griffin & Deming, Proctors for Respondent.

(Here follows side folio 623)

Respondent's Exhibit 18.

498A



[fol. 624] IN UNITED STATES DISTRICT COURT

102-296, 102-128, 102-155, 103-353, 105-360

LOUIS H. MAY, Libellant,

vs.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT, Respondent

Consolidated

REPORT OF SPECIAL COMMISSIONER—Jan. 27, 1931

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I, Mark W. Maclay, Special Commissioner, do hereby report as follows:

On December 2, 1930, an order was entered herein referring these causes to me as Special Commissioner "to hear the evidence adduced by the respective parties, and to report" my conclusions thereon to the court with all convenient speed. By this order of reference it was further ordered "that said report of the Commissioner shall be advisory only and shall not be construed to be a determination of the issues" and "that the Commissioner's fees and stenographic expenses of the reference be taxable against the unsuccessful party, unless the Court otherwise orders."

On December 10, 1930, the witness Schier, chief officer of the M. S. Isis who was about to go to sea, was examined on behalf of the respondent before me. By agreement the trial of the causes was set for December 22nd. On December 22nd [fol. 625] and 23rd I was attended by Messrs. McCutchen, Olney, Mannon & Greene and Messrs. Bigham, Englar, Jones & Houston (Henry N. Longley, Esq., advocate), proctors for the libellant, and by Messrs. Haight, Smith, Griffin & Deming and William Denman, Esq. (Charles S. Haight, Esq. and Charles S. Haight, Jr., Esq.), proctors for the respondent, who presented testimony consisting of 273 pages of minutes, numbered 171-443, inclusive, and exhibits marked Libellant's Exhibits A-H, inclusive, and Respondent's Exhibits 1, 1a, 3-18, inclusive, which are filed herewith.

In order to facilitate reference to the testimony, all of that taken in New York was given consecutive page num-

bers, so that pages 1-130, inclusive, cover the deposition of the captain;[1] pages 131-170, inclusive, cover the mate's testimony;[2] and pages 171-443, inclusive, cover the minutes of the trial itself.

It will be noted that, contrary to the usual custom, the libellant's exhibits are lettered and the respondent's are numbered. This also was done to facilitate reference and to avoid duplication of identifying letters or numbers, as in the first testimony, taken in Hamburg,[3] the exhibits attached were designated in this way. It is believed the situation is made clear on pages 171-173 of the trial minutes.

In order to expedite consideration of the case the respondent filed its brief first and after filing and service of the main briefs of the two parties, each was permitted to file a reply. These briefs were filed respectively on De- [fol. 626] cember 31, 1930, and January 7, 12, and 15, 1931.

In view of the prevailing doubt as to the most convenient practical way to comply with Admiralty Rule 46½, I have prepared this report in the form of an opinion, divided as it seems to me the determination of the various issues of the case logically requires; with an appendix containing findings of fact and conclusions of law stated in brief summary form.

The findings and conclusions thus summarized are intended to cover all points in dispute, but not to include admitted or wholly uncontroverted facts or conclusions such as the due incorporation of the parties. If the appendix is not a sufficient compliance with Rule 46½, it is hoped that the arrangement of the opinion itself will permit the court to supplement the findings and conclusions sufficiently to prevent any prejudice to the parties.

Having considered the evidence and the argument of counsel, I hereby further report as follows:

I. Statement

Five libels, designated as Actions Nos. 1, 2, 3, 4 and 5, were filed to recover deposits alleged to have been wrongfully required to secure general average contributions

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[1] (Respondent's Exhibit 14.)

[2] (Respondent's Exhibit 15.)

[3] (Respondent's Exhibit 13.)

claimed by the owner from the several parcels of cargo of the M. S. Isis referred to in the five libels. Five stipulations are in evidence.[1] A further stipulation concerning the bills of lading in the five suits was marked in evidence after the hearing but before final submission of the case.[2] By order entered herein on January 13th, the five actions were consolidated.

[fol. 627] The effect of the pleadings and these stipulations is as follows:

1. The incorporation of the parties and other formal matters are admitted.

2. All the merchandise referred to in the libels was received on board the M. S. Isis in good order and condition, and was shipped and carried under bills of lading, photostatic copies of which are attached to each libel, with the exception of Action No. 5. In respect of that cargo, it is stipulated that the forms of the bills of lading were the same as those in Action No 1.[3] The photostatic copies are stipulated to be correct with the exception of some of the amounts of freight, which in Suits Nos. 1, 3 and 4 are corrected in accordance with Exhibit H.

3. The cargo was transshipped at Bremen by lighter or lighters to Hamburg, Antwerp and London, where delivery was refused unless deposits were made by the respective consignees as security for general average contributions. The names of the parties making the general average deposits, the dates when they were made, the amounts of the deposits, the merchandise in respect of which they were made, the ownership of the merchandise, and the subsequent assignment directly or indirectly to the libellant of all right, title and interest in and to the deposits and any cause of action against the respondent by reason of the demand and collection of the deposits, are admitted. Exhibits C-G, inclusive.

[fol. 628] 4. The damages demanded in each libel are the respective amounts of the general average deposits with

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[1] (Exhibits C-G, inclusive.)

[2] (Exhibit H.)

[3] (Exhibit H.)

interest thereon from the dates of deposit. The principal amount of damages claimed is as follows:

Action No.	1	$17,800.95
" "	2	1,540.60
" "	3	65,773.28
" "	4	23,852.17
" "	5	13,317.03
		$122,284.03

5. The libels allege that the refusal to deliver without general average deposits was wrongful and in breach of the bills of lading. This is denied by the answers, which allege the refusal to deliver without general average deposits was not contrary to but in accordance with the bills of lading.

6. The separate defense pleaded in the answers is based on paragraphs 4 (liberty to transship), 5 (liberty to forward), 7 (requirement of deposit to secure general average contribution in accordance with York-Antwerp Rules of 1890, etc. and the Jason clause) and 8 (exemption from and limitation of liability in the Harter Act and [Canadian] Water Carriage of Goods Act, 1910), in the case of shipments made under one of the two forms of bill of lading; and on paragraphs 4 (liberty to transship), 20 (general average clause), and 28 (providing a lien on goods for freight and charges), in the case of the other form of bill of lading. Briefly, this defense is that the "Isis" was seaworthy for her intended voyage on sailing from her last [fol. 629] loading port; that the disasters which gave rise to the general average sacrifices were caused by negligent navigation; that under the bills of lading the cargo under such circumstances must contribute in general average; and that the deposits demanded in the libel were properly required to secure such general average contribution from the cargo as ascertained and fixed by competent adjusters, in accordance with the bills of lading.

II. The Facts

The following facts either are specifically admitted, are undisputed or are so clearly established by the evidence as to make any discussion of the evidence unnecessary.

The motorship "Isis", a vessel 376.2 feet long, 51.8 feet wide, 28 feet 3¾ inches molded depth, of about 7,000 tons deadweight, equipped with twin screws, driven by engines having 2,400 total horsepower, loaded at various Pacific coast ports with cargo destined for Bremen, Hamburg and Antwerp. When she left the last port of loading, she was in all respects seaworthy and properly manned, equipped, victualed and supplied. Exhibit 14 Krueger, 4.

On February 6, 1928, while on her way to Bremen, the first port of discharge, she stranded in the Weser River, and in getting clear, some hours later, her stern swung across the channel and struck the opposite bank. Most, if not all, of the force of the blow fell on the port side of the rudder, resulting in a twist of 45° in the rudder stock, as was afterwards discovered.[1] When the "Isis" resumed her way up the Weser, she developed a tendency to sheer to starboard. With the assistance at first of two tugs, and [fol. 630] later of three more tugs, she continued on up the river to Bremen, where she arrived without further incident. At this time her draft was 23 feet 3 inches forward and 23 feet 5 inches aft.[2]

It is not disputed that this stranding was caused by negligence in navigation.

While the Bremen cargo was being discharged, the rudder was examined by a diver, who found nothing wrong with it.[1] The "Isis", then drawing 18 feet 6 inches forward and 23 feet 3 inches aft, was drydocked at 4.18 p. m., February 9th and the water in the dock lowered sufficiently to uncover all but three or four feet of the rudder.[2]

As the result of an examination held about dusk and after dark by Capt. Reichenbacher, marine superintendent for Hamburg-American Line; Inspector Schubert; Adolf Menck, dock engineer of Weser Drydock; John Wuhrmann, dock inspector of the Weser Drydock; and Captain Krueger, of the "Isis", it was found that although the rudder stock was twisted about 45°, the rudder blade itself was fair and straight in so far as it was visible, and its submerged portion appeared to be in the same condition from

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[1](Exhibit 14, Krueger, 6-8.)
[2](Exhibit 12.)
[1](Exhibit 14, Krueger, 10, 56.)
[2](Exhibits 12 and 13.)

such examination as could be made by hand, boathook, and straight edge, assisted by electric searchlight.

(Exhibits 13 and 14.)

On account of the engagements of the drydock it was necessary to float the "Isis" within a few hours and no [fol. 631] other dock was available to make complete repairs for a matter of two weeks.

(Exhibit 13, Reichenbacher, 31, 37.)

Witnesses called by the libellant testified that it would have been practical in the time during which the drydock was available to have unshipped the rudder and removed the rudder and rudder stock altogether; and that both could have been repaired or renewed, if necessary, and replaced in a matter of 6 to 8 days.[1] It was also testified that if it were not possible again to drydock the "Isis" so as to replace the rudder, it would have been safe to tow her to Hamburg without a rudder and that this would have been more prudent and safe than the course which was in fact pursued.[2]

Apparently for the purpose of saving time and expense to the vessel, her cargo, or both, it was determined to send the "Isis" on to Hamburg with her rudder lashed and in tow of tugs. Interested underwriters were informed of the plan and the Secretary of the Hamburg Underwriters Association's Average Committee reported that if the rudder were straight and lashed amidships, towage by two tugs from Bremen to Hamburg was considered safe and in order. Exhibit 13.

Thereupon the rudder of the "Isis" was lashed by wires led to the quarter bitts and set up with tackles and the quadrant was secured by one or more set screws. Three tugs instead of two were engaged and took charge of the vessel, one ahead and one on either quarter, when she left the drydock at about 1:30 a. m. on February 10th.
[fol. 632] The flotilla entered the Weser River itself at a point about half way between the points known as Kilo-

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[1] (Jordan, 248-250; McGregor, 288-289.)
[2] (McLennan, 189; McGregor, 289; Davis, 373-374.)

meter 5 and Kilometer 6,[1] and started down stream about 2.11 a. m. against a flood tide.[2]

Between the 17th and 18th Kilometers, the river Lesum enters from the east or starboard side and the Weser bends quite sharply to the west or port, from the point of view of down-bound vessels.[1] At the time in question the flood tide current of about 3 kilometers per hour was setting up both rivers.

All went well until after a vessel bound up the river was sighted below this bend when the "Isis" was in the vicinity of the 16th Kilometer.[1] In order to pass, the "Isis" was navigated somewhat to starboard. She passed the other vessel safely near the 17th Kilometer but before she was entirely clear of this vessel she sheered to starboard in spite of the efforts of the tugs and her engines, and while out of control, she was caught by the current on the port bow in such a way as to strand hard and fast amidships on the sand spit separating the junction of the Weser and Lesum Rivers, near Vegesack.[2]

The time of stranding was 3.52 a. m. (Exhibits 11 and 12; Exhibit 14, Krueger, 77.)

In order to release the vessel from the strand divers sacrifices were made and expense incurred, consisting prin- [fol. 633] cipally of the assistance of tugs and the lightering of cargo. These efforts were successful and on the evening of February 10th the "Isis", assisted by tugs, again proceeded up the river to Bremen. (Exhibit 12.)

As she had sustained considerable damage on the occasion of the second stranding, extensive repairs were necessary, so that the entire cargo was discharged and delivered at destination by transshipment, and the vessel drydocked for complete examination.

The average was adjusted and stayed by Alfred Schmidt and E. Prosch under date of Hamburg, February 15, 1930. (Exhibit 16.)

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[1](Exhibit 9.)

[2](Exhibit 14, Krueger, 21-22, 37-38.)

[1](Exhibits 8 and 9).

[1](Exhibit 14, Krueger, 21-23, 70.)

[2](Exhibit 14, Krueger, 23-26, 70-73, 81-82, 92-94; Exhibit 8 [Z].)

Before delivering the cargo to the consignees at destinations, the respondent demanded and obtained deposits to secure payment of the general average contribution of each parcel of cargo to the sacrifices and expenses due to the two strandings. This suit is brought to recover back the deposits thus made.

III. The Bills of Lading

All of the cargo was shipped under bills of lading on either of two forms. While other clauses are pleaded, those relating to general average are the ones of chief importance in determining the present issues.

Most of the cargo was shipped under a form of bill of lading providing as follows:

"7. General Average shall be payable in accordance with York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the port of New York. All General Average [fol. 634] statement- shall be prepared at the vessel's final port of discharge or elsewhere at the carrier's option. If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the vessel, or from any latent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril. The general average statement is to be made up in American Gold Dollars or in British Pounds Sterling or in Reichsmark at shipowners option. The shipowner is entitled to require a deposit in any of these three currencies."

The cargo shipped at Punta Arenas was carried under another form of bill of lading, which provided in paragraph 20, as follows:

"20. General Average, if any, to be adjusted at the Company's option either at Bremen/Hamburg or at final Port of Destination; always according to York-Antwerp Rules, and as to matters not therein provided for, according to the usages of the place where the adjustment is made up. In case of General Average the contributing value of the ship [fol. 635] shall be taxed obligatory in a German port. For this purpose the Owners are bound to declare, if required, the value of the goods and no goods will be delivered without security having been given by the Owners for the due payment of such General Average. Default, Error, Neglect in judgment or mistake of the Pilot, Master or the Crew in the navigation of the Ship, Defects of the Vessels or her Engines not noticed before and occasioned during the voyage shall not release the Owners from such contribution."

It will be noted that the principal difference between the two forms is the absence in the latter of the express condition that due diligence must be used to make the vessel seaworthy. The Punto Arenas form is thus differentiated from the standard Jason clause, Congdon, General Average (2nd ed., 1923), p. 48, with which the other form is substantially identical.

The libellant contends that under Irrawaddy (1898), 171 U. S. 187, and Jason (1912), 225 U. S. 32, the shipowner cannot recover from the Punta Arenas cargo a general average contribution to sacrifices resulting from negligent navigation or unseaworthiness, because the absence of the due diligence provision has the effect of invalidating the entire general average clause.

Those decisions of the Supreme Court do not justify this conclusion. In Irrawaddy, the validity of a general average clause was not in question and the point in the case was whether, in the absence of an agreement in the contract, the Harter Act of its own force entitled the owner to share in a general average rendered necessary by negligence in navigation. The decision in the negative was later thus construed and defined. Jason (1912), 225 U. S. 32, 54.

[fol. 636] The decision in Jason is that an agreement that if the owner had exercised due diligence to make his vessel seaworthy, he should be entitled to share in a general average rendered necessary by negligence, was valid and entitled the owner to recover a contribution arising out of a negligent stranding. The Supreme Court did not hold that the absence of the condition that due diligence must be exercised would invalidate the clause, and the opinion specifically states that "so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence." Jason (1912), 225 U. S. 32, 55.

The reasoning suggested by the libellant is contrary to the interpretation which the courts have placed on bill of lading exemption clauses, which, if construed literally, would be sufficiently broad to cover damage caused by negligence, unseaworthiness and failure to use due diligence in that regard. If the owner shows that the loss was due to some peril excepted in the bill of lading in general terms, such as leakage, the cargo claimant recovers only if he proves negligence on the part of the shipowner. In other words, the shipowner is permitted to rely on the contract exemption in so far as its effect is not in violation of the Harter Act, or for that matter, of the public policy against carrier's limitation of liability for negligence, established prior to the Harter Act. None of these general clauses could be relied on at all if they were invalid in the sense of wholly void.

Thus, before the enactment of the Harter Act, the exception of a loss by theives or robbers was valid "unless it [fol. 637] be shown that there was negligence on the part of the ship which contributed to the theft or facilitated it," Saratoga (1884), 20 Fed. 869, 871; and the prohibition of the Harter Act against bill of lading clauses relieving from liability for negligence in the custody or care of the cargo, limits but does not invalidate general exemptions such as "goods on the quay shall be at the sole risk of the shipper" and "the proper construction of such general language restricts it to cases where the carrier is not at fault for negligence or failure of due care." Cunard S. S. Co. v. Kelley (1. C. C. A., 1902), 115 Fed. 678, 686; Compania La

Flecha v. Brauer (1897), 168 U. S. 104, 123; Toronto (2 C. C. A., 1909), 174 Fed. 632, 634. Exemptions from negligence, leakage, breakage, etc. cannot avail the vessel if she were negligent or unseaworthy, but as thus constructed they are not void. Florinda, 1927 A. M. C. 1515, 22 Fed. (2d) 159, 163.

I think the general average provision above quoted from the Punta Arenas bill of lading should be construed as impliedly containing the restrictions of the Harter Act, and that as so modified by such implication, it should be applied and enforced. The practical effect of the general average provisions in the two forms of bills of lading under this construction is substantially the same. It follows that there is not any necessity to consider separately the cargo shipped under the two forms and all of the cargo will, therefore, be treated as if it had been shipped under bills of lading containing the Jason clause in the form above quoted.

The foregoing also makes it unnecessary to give separate consideration to expenses arising out of the first strand-[fol. 638] ing, because the contribution of the Punta Arenas cargo only is disputed.

IV. Jurisdiction

Neither party entertains any doubt about the jurisdiction of admiralty in the premises. However, as jurisdiction over subject matter cannot be conferred by consent, I think brief reference should be made to the point in view of the numerous decisions, in this Circuit as well as elsewhere, which hold that there is no jurisdiction in admiralty of an action in the nature of a suit for money had and received. United Transp. & L. Co. v. New York & Baltimore T. Line (2 C. C. A., 1911), 185 Fed. 386; Israel v. Moore & McCormick Co. (1920), 295 Fed. 919; Kootenai, 1924 A. M. C. 67; 295 Fed. 422; T. W. Lake; Home Ins. Co. v. Merchants' Transp. Co. (9 C. C. A.), 1927 A. M. C. 57, 16 F. (2d) 372. The substance of such a claim is considered to be not essentially maritime and purely equitable at least where the issues are whether or not there was in fact fraud, duress or other similar ground of equitable jurisdiction.

In the present case, while the respondent denies the allegation of the libel that the deposits were required by

duress, there is neither issue nor dispute on the facts themselves in this regard. It is clear that the respondent refused to deliver the cargo to the libellant's assignors unless the deposits were made and under such circumstances the deposits were not voluntary. The issue raised is whether the deposits were required in accordance with or in breach of the terms of the contracts of carriage, which obligated the ship to deliver the cargo free of liens or charges except those properly incurred; the decision depends on [fol. 639] whether the sacrifices and expenses properly form the basis under the contracts of carriage of a general average contribution from the cargo, to secure which the deposits were required. This is an issue of maritime character arising under bills of lading which are undoubtedly maritime contracts, and must be resolved on evidence which an admiralty court is peculiarly qualified to deal with adequately.

I find and advise the court that jurisdiction should be sustained on this theory and on the authority of Church v. Shelton, Mass. (1885), 2 Curt. 271, Fed. Cas. No. 2,714; Oceano (1906), 148 Fed. 131, 132; Fredensbro, 1927 A. M. C. 1258, 18 F. (2d) 983, 984; cf. Muskegon, 1924 A. M. C. 1512; Valdura, 1923 A. M. C. 111; 286 Fed. 747; Kootenai, 1924 A. M. C. 67, 295 Fed. 422.

V. Deviation

It seems so clear on any interpretation of the facts that the "Isis" was not guilty of a deviation, that I should not refer to the point were it not for the earnestness with which the libellant urged in oral argument and in thirteen pages of his brief that the respondent became liable as an insurer because the departure of the "Isis" from Bremen in tow under the circumstances of this case constituted a deviation.

There may be some question whether under the issues framed by the pleadings a charge of deviation may now be considered. G. W. Sheldon & Co. v. Hamburg-Amer. P. A. G. (3 C. C. A.), 1928 A. M. C. 1672, 28 F. (2d) 249, 251-252. However, there is no surprise and the libellant's argument for deviation is based on the respondent's evidence. I shall, therefore, consider the point. Dupont de Nemours [fol. 640] & Co. v. Vance (1856), 19 How. 162, 172-182; Gazelle and Cargo (1888), 128 U. S. 474.

It is difficult to see how the facts of the case may be brought within the classical definition of deviation, Constable v. National Steamship Co. (1894), 154 U. S. 51, 66-67; Hostetter v. Park (1890), 137 U. S. 30, 40; even though the definition is expanded in accordance with the modern developments of the doctrine, as expressed in G. W. Sheldon & Co. v. Hamburg-Amer. P. A. G. (3 C. C. A.), 1928 A. M. C. 1672, 28 F. (2d) 249, 251. Nothing shown, or even alleged, to have been done by the "Isis" approaches the default of the owner in Malcolm Baxter, Jr., 1928 A. M. C. 960, 277 U. S. 323, held by the Supreme Court not to constitute a deviation. Cf. Kish v. Taylor [1912], A. C. 604. Pinellas, 1929 A. M. C. 1301, affirmed (4 C. C. A.), 1930 A. M. C. 1875, is illustrative of the necessary elements of a deviation which are lacking in the case at bar.

Willdomino, 1927 A. M. C. 129, 272 U. S. 718, and dicta in Malcolm Baxter, Jr., 1928 A. M. C. 960, 277 U. S. 323, hold, as the libellant states in his brief, that the shipowner deviates when he sets out on his voyage knowing that he cannot complete it without a departure from the regular and usual course of the voyage. The latter decision, however, made it plain that mere careless disregard of the vessel's ability to reach her destination is not sufficient and that for a deviation to be voluntary and inexcusable, the owner must know that it is actually impossible for the vessel to complete the voyage in accordance with the contract. Surely it cannot be said that on any interpretation of the evidence, the respondent knew that the "Isis" could [fol. 641] not possibly reach Hamburg in safety. The contention of the libellant, reduced to its lowest terms, is that an owner who permits his vessel to sail in unseaworthy condition and without exercising due diligence to make her seaworthy commits a deviation; and this is precisely what the Supreme Court refused to hold in Malcolm Baxter, Jr., 1928 A. M. C. 960, 277 U. S. 323, 331, 332.

VI. The Cause of the Stranding.

The libellant contends that the "Isis" sheered to starboard and stranded because here rudder blade was bent as the result of the first stranding. Questions concerning the bend itself will be considered later and for the purpose of fixing the cause of the stranding it will be assumed that

the bend of 5° in the rudder blade existed when the vessel left Bremen.

The direct evidence concerning the circumstances of the stranding is confined to that of the captain,[1] and the mate,[2] and the captain of one of the towboats.[3] Their evidence is that no difficulty was experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, in spite of several bends in the channel in both directions.[4]—The only evidence adduced to the contrary is found in the investigation and report of the Seeamt.[5] The investigation by the Seeamt was not stenographically reported. This circumstance, together with some obvious errors and the sworn testimony of the witnesses that there were other errors, casts doubt on the accuracy of the report of the proceedings[6] if not on the thoroughness and accuracy of the investigation itself. While the statements of the captain in the Seeamt investigation are clearly [fol. 642] admissible against the vessel, Potomac (1869), 8 Wall. 590; Lisbonense (2 C. C. A., 1892), 53 Fed. 293; Fanwood (1894), 61 Fed. 523; Bellota, 1928 A. M. C. 485, I find that they are sufficiently contradicted or explained by the captain's thorough examination and cross-examination when his evidence was taken.

If there was any bend in the rudder or anything else which affected the steering of the "Isis," it would seem obvious, and the expert evidence is, that any competent navigator could not fail to have discovered some indication of it by the time the vessel had gone a half a mile or at least had reached her full towing speed of 7 or 8 kilometers. (Davis, 376-377, 382-384.)

So far as there is any evidence of the engine movements of the tugs, it indicates that all three of them were towing full speed ahead all or most of the time until shortly before

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[1] (Exhibit 14.)

[2] (Exhibit 15.)

[3] (Exhibit 13, p. 41.)

[4] (Exhibit 13, Klaassen, 44; Exhibit 14, Krueger, 34-35; Exhibit 15, Schier, 144.)

[5] (Exhibits A and B.)

[6] (Exhibits A and B.)

the ship grounded. (Exhibit 13, Klaassen, 44; Exhibit 15, Schler, 144; Exhibit A, Zey, 17.)

The captain's estimates of the position of the "Isis" at the time of various engine movements are not convincing because they are confessedly based on the maneuver book itself and hence are actually mere inferences from the engine movements the times of which are clearly established by the maneuver book.[1] However, the entries in the maneuver book tend to support the testimony of the captain, chief officer, and tow boat captain, rather than the findings (fol. 643) of the Secamt that the vessel showed a tendency to sheer to starboard on her way down the river. It is quite clear that such use of one engine over the other as appears at various periods is no more than would be expected in navigating the bends in the channel of the Weser, around which the "Isis" certainly passed successfully between 2.11 and 3.50 a. m.

Thus from 2.24 a. m., up to which time the "Isis" was probably being straightened out in the channel, until 2.40 a. m., the port engine was stopped and the starboard engine was worked slow ahead at intervals of less than a minute each, the aggregate time of forward movement of the starboard engine being about six minutes out of the total of sixteen.[2] As the vessel must have been going around a gradual bend to port in the channel during most or all of that time[3] it would be necessary to use the starboard engine more than the port engine for normal steering. If she had in fact a tendency to sheer to starboard, it is scarcely possible that such limited movements of the starboard engine would have been sufficient to correct the tendency; or approaching the question conversely, if such slight use of her engines was sufficient to keep her in the channel at this time, the power of her engines and the tugs was thoroughly adequate to correct whatever tendency to sheer to starboard there may have been.

From 2.40 to 2.53 a. m. the two engines were used about equally, one minute half astern on the port engine being balanced by five minutes during which the starboard engine

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[1] (Exhibits 7 and 17.)
[2] (Exhibit 7.)
[3] (Exhibits 8 and 9.)

[fol. 644] was stopped; and between 2.53 and 3.16 a. m. the port engine was stopped and the starboard engine was used slow ahead for several intervals of a minute or less each. Such engine movements are consistent with the very slight bends, first to starboard and then to port, in the channel between the 9th kilometer and the 13th kilometer. The interval of 4 kilometers is just about the distance the "Isis" would be expected to traverse in the 36 minutes between 2.40 and 3.16 a. m. at her average speed over the ground of about 8 kilometers per hour. It is difficult to infer from the engine movements during this period the correction of any tendency to sheer to starboard.

From just above the 13th kilometer to the vicinity of the 15th kilometer the chart shows a gradual bend to starboard quite similar to the bend to port between the 5th and 9th kilometers. The engine movements between 3.16 and 3.40 show that the port engine was used rather more than the starboard engine, which would probably not be so if the vessel had a tendency to sheer to starboard.

The captain fixed 3.40 as the time when the "Isis" passed the upbound vessel, which had been sighted below the bend some minutes before.[1] At this time occurs some indication of an effort to turn the vessel to port. At 3.40 the port engine was put half astern and the starboard engine half ahead, but it was not until 3.50, after a number of ahead movements on both engines, that the port engine was put full astern. At 3.53 the port engine was stopped and the starboard engine was put full astern and at 3.54 both engines were put full astern.

[fol. 645] From these engine-room records it is difficult to infer any tendency to sheer to starboard until 3.45. The entries in Exhibit 7 by inference support the captain's evidence that she brought up at 3.52, as it seems highly unlikely that the starboard engine would have been put full speed astern, which was done at 3.53, until after the vessel had stranded.

Considering the direct evidence, the report of the Seeamt investigation, and the manoeuver book together, there is not any reason to believe that the "Isis" developed any

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[1] (Exhibit 14, Krueger, 41.)

marked tendency to sheer to starboard and the preponderance of the evidence is that she did not. If there was any such tendency to sheer, the preponderance of the evidence is that the power of the vessel and her tugs was amply sufficient to correct it and to control the vessel.

What then caused the "Isis" to sheer and take the ground? The evidence of Captain Krueger that the "Isis" was towed down the Weser at a speed of about 8 kilometers over the ground and 11 kilometers through the water,[1] is supported by the probabilities. It sufficiently appears that at 2.11 a. m. the "Isis" was half way between the 5th and 6th kilometers and that at 3.52 she stranded about half way between kilometers 17 and 18. She thus traversed a distance of 12 kilometers in 1 hour and 41 minutes, or about 7¼ kilometers per hour over the ground. The manoeuvers immediately before the stranding probably reduced her average speed and there are indications that other reductions in speed may have been made. At the time she sighted the upbound vessel, it is likely that she was proceeding at more, rather than less, than 8 kilometers per hour over the ground.

[fol. 646] The ship was about 50 feet wide and the tugs alongside probably about 25 feet each, making the total width of the flotilla about 100 feet. In order to pass the upbound vessel it was thought, and quite properly so, necessary to keep the entire flotilla on the starboard side of the channel, which was about 300 feet wide. It was thus necessary to manoeuver with a clearance of approximately 25 feet on each side, assuming that ordinary prudence required a clearance of at least 25 feet between the passing vessels.

In my opinion the stranding which followed closely after passing the upbound vessel was due to the "Isis'" smelling the bank on the starboard side of the channel. Captain Davis, a most experienced navigator, particularly of disabled vessels, was very clearly of the opinion that a vessel proceeding at a speed through the water of 6 knots or 8 kilometers,[2] the speed which the "Isis" was undoubtedly making over the ground, could not pass so close as 30 feet

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[1] (Exhibit 14, Krueger, 22, 40, 78.)

[2] (Davis, 370, 372, 380.)

to the edge of such a channel without danger of smelling the bottom and sheering toward the bank.[2] While there is no direct evidence of how close to the edge of the channel the "Isis" actually was when passing the upbound vessel, the inference is almost inescapable that she was much too close for safety at the speed she was going. It is difficult to understand why the pilot dropped the starboard tugboat and stopped the starboard engine for fear of fouling the chain of one of the channel buoys unless the "Isis" was then very close indeed to the bank of the channel.

Captain Davis explained very clearly that while it would be prudent to navigate within a very few feet of the edge [fol. 647] of a channel at low speed with a head current, it would be highly hazardous to do so at higher speeds. There is other testimony in support of both his reasoning and conclusion. (Davis, 371, 384-385.)

As the preponderance of the evidence is that the "Isis" showed no marked tendency to sheer on the way down the river, as there is direct evidence that she was navigated at too high a speed and too close to the edge of the channel, as the expert testimony of experienced navigators shows that a sheer in the direction of the bank is a reasonable and probable consequence of such navigation and that such a sheer is extremely difficult to check even with the assistance of towboats, and as the theory that the sheer was caused by a bent rudder rests entirely in conjecture, I find and advise the court that the stranding was caused by an error in navigation on the part of the pilot; and that unseaworthiness, if any, in respect of the steering gear of the "Isis" did not cause or contribute to the stranding.

VII. Casual Connection Between Unseaworthiness and Disaster as a Condition of the Application of the Jason Clause

The libellant urges that if the "Isis" were unseaworthy and due diligence were not exercised, he may not be called on to contribute in general average because seaworthiness, due diligence to assure which is required as a condition of the Jason clause and exemption from liability under Section 3 of the Harter Act, is literally seaworthiness in all

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[2] (Davis, 384-385.)

respects, quite irrespective of any causal connection be- [fol. 648] tween the particular unseaworthiness and the disaster giving rise to the loss or general average expense or sacrifice. In support of this contention it is argued that the requirement that "the carrier shall have exercised due diligence to make the vessel in all respects seaworthy, etc." in both Jason clause and Harter Act, is expressed as a general condition of the applicability of the special agreement in the one case and the statutory exemption in the other case; and that the words "in all respects" are to be construed literally.

There is language in an opinion of this court, and there is a definite holding by the Circuit Court of Appeals for the Third Circuit in support of this construction of the Harter Act. River Meander (1913), 209 Fed. 931, 937; Willdomino (3 C. C. A.), 1924 A. M. C. 889, 300 Fed. 5, 11.

The authority of this part of the opinion of the Circuit Court of Appeals in Willdomino is considerably weakened by the fact that when the case went to the Supreme Court the opinion of that court carefully refrained from dealing with the point. Neither that decision nor the language of Judge Holt in River Meander can now be considered as authority in this Circuit in view of the specific disapproval of the construction of the Harter Act in those cases by this Circuit Court of Appeals in its opinion in Spartan (Hartford & New York Transportation Co. v. Rogers & Hubbard Co.), 1931 A. M. C. 1, p. 7.

The discussion of the point by Judge A. N. Hand in Hartford & New York Transportation Co. v. Rogers & Hubbard Co., as follows, is characterized by the libellant as dicta not binding on me in this case:

"While it is contended that the Harter Act requires the owner to provide a ship that is in all respects seaworthy [fol. 649] before he can take advantage of the exemptions under that Act, this requirement affects only causes of action for damages resulting from unseaworthiness. It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness. Malcolm Baxter, Jr., 277 U. S. 323, 1928 A. M. C. 960; Turret Crown, 284 Fed. 439, Turret Crown, 282 Fed. 354; Thessaloniki, 267 Fed. 67. In view of the

foregoing, the language of Judge Morris in the Willdomino, 1924 A. M. C. 889, 300 Fed. at page 11 (3 C. C. A.) to the effect that a carrier is liable 'wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel' cannot be regarded as in accord with the authorities."

Even if the foregoing extract from the opinion of this Circuit Court of Appeals does not actually bind me, it authoritatively persuades me.

The libellant also cites Wilderoft (1906), 201 U. S. 378, 388-389, and Int. Nav. Co. v. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218, in support of his contention that neither Section 3 of the Harter Act nor the Jason clause may be relied on by the carrier where the vessel is unseaworthy in any respect, even though there be no causal relation between the unseaworthiness and the casualty.

In Wilderoft, although the Supreme Court referred to the Harter Act as requiring that the vessel shall be "in all respects seaworthy," in discussing the testimony in this regard, the opinion upheld the judgment of the courts be- [fol. 650] low that the shipowner had established "that the vessel was seaworthy in the respects involved, and that an inspection had been had, and the valves and connections, the negligent use of which was productive of this injury, found in due order at the beginning of the voyage." c. 387. While the court did not have under consideration the question of causation here presented, the fact that it dealt only with the evidence concerning seaworthiness "in the respects involved," that is, concerning the valves and connections "the negligent use of which was productive of this injury" and thereupon held that the ship "was seaworthy in all respects at the beginning of the voyage," is a strong indication that the court regarded the condition of Section 3 as a specific one relating only to seaworthiness as far as it pertained to the disaster itself.

In Int. Nav. Co. v. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218, burlap was damaged by seawater admitted through a port left insufficiently fastened. In the courts below it was found that although the ship was generally seaworthy and properly equipped and the failure to close

the port properly was due to negligence in the use of proper equipment, nevertheless the vessel was unseaworthy on sailing in respect of that port. From the reports it does not appear that the question of causal connection between the specific unseaworthiness and the damage was even discussed. The Supreme Court held that general seaworthiness was not sufficient and that in order to avail himself of the exemption in Section 3 of the Harter Act, the shipowner must affirmatively show that he had exercised due diligence to make the vessel seaworthy in the specific respects which caused the loss. It did not hold or intimate [fol. 651] that if the vessel had been in fact seaworthy in the specific respect, she must also have been seaworthy in every other respect.

The decisions holding that in the event of unseaworthiness the cargo owner can recover only damages proximately caused by the unseaworthiness, while not decisive of the point, have some bearing. Malcolm Baxter Jr., 1928 A. M. C. 960, 277 U. S. 323; Turret Crown (2 C. C. A.), 1924 A. M. C. 253, 297 Fed. 766, 782, cf. 282 Fed. 354, 360.

All the cases cited deal with the condition in Section 3 of the Harter Act. As far as I am aware, there are no decisions construing the similarly worded condition of the Jason clause, but there seems to be no reason for a different construction.

Under these circumstances it scarcely seems necessary to go into the intention of the framers of Section 3 of the Harter Act and of the Jason clause. Whatever may have been the legislative intent, it is scarcely believable that the shipowning and hull underwriting interests who were responsible for the Jason clause intended that it should come into play only when the owner affirmatively had proved that the vessel was literally seaworthy in every single conceivable respect. Dictates of convenience as well as reasonable and fair construction are opposed to a rule which, if followed to its logical conclusion, would require the shipowner, in case of damage to cargo by unseaworthiness of a plate in the No. 1 hold or in case of a general average sacrifice due to admittedly negligent navigation, to show that the vessel was seaworthy not only in respect of her No. 1 plating in the one case or of her navigating equipment in the other case, but also in respect of every single part of hull and machinery and of deck, engine-room and steward's

[fol. 652] equipment, or that due diligence had been exercised in that behalf. The possibility of permitting the shipowner to escape from liability for, or to recover a general average contribution in spite of, some point of seaworthiness, which never results in any damage to anyone, is surely neither unjust nor fraught with any practical danger.

Therefore, neither on principle nor on the basis of the decisions on Section 3 of the Harter Act by either the Supreme Court or this Circuit Court of Appeals should the contention of the libellant be sustained; and the owner of the "Isis" may avail itself of the Jason clause if it shows that the vessel was seaworthy or that it had exercised due diligence to that end in all respects which caused or contributed to the second stranding in the Weser. As it is not disputed that the "Isis" was seaworthy and properly manned, equipped and supplied in all respects aside from the steering gear,[1] and as I have found that the stranding was caused solely by negligent navigation and was not caused or contributed to by the defect, if any, in the steering gear, I find and advise the court that the general average deposits sued for were demanded in accordance with the contracts of carriage.

The conclusions thus reached are sufficient to dispose of the case. The order of reference, however, directs me to report conclusions on the evidence adduced by the respective parties. Furthermore a disposition at this time of all the contentions urged by the parties, independently of those already considered, will doubtless expedite the ultimate [fol. 653] determination of the case in the event that the court does not accept or an appellate court reverses some or all of the foregoing findings. I shall, therefore, consider the evidence concerning seaworthiness in fact, the due diligence of the owner to make the vessel seaworthy on sailing from Bremen, and the bearing of these points on the issues raised by the pleadings independently of the foregoing findings.

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[1] (Exhibit 14, Krueger, 77, 114; Exhibit 13, Reichenbacher, 23, 29.)

VIII. Seaworthiness of the "Isis" on Leaving Bremen in Tow Bound for Hamburg

The seaworthiness of the "Isis" on sailing from Bremen depends on whether the vessel, whose rudder stock was twisted about 45° and the upper half of whose rudder blade was straight, assuming either that the lower half was bent or deflected to starboard to the extent of about 5° or that the condition of the lower half was unknown, was reasonably fit to proceed from Bremen to Hamburg with her rudder secured amidships and in tow of three tugs, one on a hawser ahead and one lashed on either side opposite No. 4 hatch. The "Hoheweg", the tug ahead, was of 1,080 h. p. and the two other tugs, "Eversand" and "Lankenau", were of about 800 h. p. each. (Exhibit 13, Reichenbacher, 28).

Even one of the appellant's experts conceded that there was really no imprudence in sending a vessel on such a voyage with her rudder lashed amidships, provided the blade itself was substantially straight,[1] and indeed it would be difficult to reach any other conclusion, the basis of which would condemn a large proportion of the towing of steamers which is done every day in harbors all over the world. McLennan's insistence on the contrary view is detrimental [fol. 654] to the weight of his evidence.[2]

Hence, in order to establish unseaworthiness it must appear that (1) a deflection as afterwards found in the rudder blade in fact existed or may have existed before the vessel sailed from Bremen, and (2) such a deflection was so extensive as to make it imprudent to tow her at night down the Weser River.

First, what was the actual condition of the rudder blade when the vessel left Bremen in tow? If it was necessary that the "Isis" should be seaworthy upon sailing from Bremen in order to permit the owner to avail itself of the Jason clause, the burden of proof rests on the owner; and this means, with respect to the actual condition of the rudder blade, that the owner must show by a preponderance of the evidence how the injury was sustained or that it could

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[1] (Jordan, 269-270.)

[2] (McLennan, 212-214).

not have been sustained at any time prior to the second stranding. It is unlikely that the bend in the rudder blade occurred at the time of the second stranding because there is no evidence that the rudder struck anything on the port side.

The earliest time at which it was definitely known that the rudder blade itself was bent was when the "Isis" was drydocked at Bremen after the second stranding. At this time the rudder generally remained amidships as it had been secured, but the blade itself was bent about 5° to starboard, beginning about the middle of the blade.[1] The deflection was 2° or 3° two-thirds of the way from the top of the rudder.[2]

[fol. 655] None of the witnesses found this distortion when the vessel was drydocked at Bremen the first time, but it is clear from the evidence of the respondent's witnesses that the examination which was made might not, and probably would not, have revealed it. (Exhibit 13, Asmus, 113-114.)

There is no direct evidence of what produced the bend or when it occurred. It might have been sustained on the voyage prior to the first stranding; it may well have been sustained on the first stranding at the same time the rudder stock was twisted, there being abundant expert opinion on both sides of this question; it may possibly have been sustained at or about the time of the second stranding; or it might have been occasioned by some occurrence, of which there is no evidence, on the two trips up and the one trip down the Weser River. Under these circumstances, the matter resting largly in conjecture, I find that the respondent has not sustained the burden of proving that the 5° deflection in the rudder did not exist at the time the vessel left Bremen. It, therefore, becomes important to consider what effect, if any, the deflection described had upon the seaworthiness of the "Isis".

On the issue of whether or not it was safe on the trip to Hamburg, assuming that the 5° set in the rudder blade actually existed on sailing from Bremen, considerable expert testimony was produced and hypothetical questions were asked and answered, with the usual inconclusive re-

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[1](Exhibit 13, Asmus, 107.)

[2](Exhibit 13, Asmus, 113; Exhibit 14, Krueger, 27.)

sult. With the exception of the witnesses examined by the respondent abroad,[1] most or all of the expert witnesses lack sufficient familiarity with the actual conditions to go very [fol. 656] much beyond generalities. Indeed, even the generalities were not supported with any persuasive reasons except in the case of Captain Davis, whose appearance and candor in testifying were even more impressive than his experience covering over thirty-three years' activity in salvage work, during most of which time he has been a well-known wreck-master.[2] He was extremely careful to confine himself to his own knowledge and experience and to the facts actually developed by the testimony and exhibits. His frankness in re-direct examination concerning the relative desirability of navigating in daylight or darkness illustrates his attitude in testifying.[3]

Captain Davis considered that the fact that the "Isis" left Bremen about 5 feet by the stern was of material assistance in controlling the vessel at slow speed with the assistance of tugs.[4] He declared that the tugs as described in the Hamburg testimony were properly located. While a 5° deflection from the true in the rudder might have affected the steering of the vessel to some slight extent, the tugs provided should have been amply able to overcome any such defect.[5] As between a twin-screw vessel with her rudder in working order without tugs and a similar vessel with her rudder lashed amidships and attended by three tugs, one ahead and one on each quarter, the former arrangement would give superior control at high speeds and in open water, but the latter would give better control at low speeds and in shallow or congested waters.[6] On cross-examination Captain Davis expressed the opinion that the former arrangement would give better steering control at speeds over 7 or 8 miles per hour; between 5 and 7 miles per hour, the [fol. 657] two arrangements would be about equally efficient; and at speeds less than 5 miles per hour, the tugs

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[1] (Exhibit 13.)
[2] (Davis, 349.)
[3] (Davis, 375-376.)
[4] (Davis, 357.)
[5] (Davis, 355-356.)
[6] (Davis, 357-358.)

would clearly be able to handle the "Isis" better than the vessel unattended but with her rudder in operating condition.[4]

The views expressed by Captain Huseby, an experienced local towboat man, are similar. He thought that the "Isis" would have to attain a speed through the water of 6 miles per hour or more before she would feel the effect of a deflection in the rudder at all and even then such deflection would have to be more than 10°. Such a vessel does not attain steerage way so as to feel the effect of a helm hard over until she attains a speed of 3½ to 4 miles an hour through the water. He thought it was scarcely possible, therefore, that so slight a deflection as 5° to 10° would have an appreciable effect on the steering, even at a speed of 7 or 8 miles per hour through the water. There was no question in his mind that the three tugs could easily have overcome any effect of such deflection. (Huseby, 400, 437-442.)

These views I adopt as far more convincing than those to the contrary of the other witnesses who failed to support their conclusions with satisfactory reasons from experience.

I should have little difficulty in coming to the conclusion that the 5° deflection in the rudder blade had nothing to do with the stranding, did not render the vessel unseaworthy, did not substantially increase the risks of towage, and is generally an immaterial circumstance, were it not for the [fol. 658] fact that two of the respondent's witnesses testified very definitely that they would not have sent the vessel on her voyage to Hamburg if they had thought that the rudder of the "Isis" was in the condition in which it was afterwards found to be. (Exhibit 13, Reichenbacher, 121; Exhibit 14, Krueger, 67.)

It is urged by the respondent that these witnesses may not really have had in mind whether the bend afterwards found was really dangerous, and perhaps merely meant that they would not have sent the vessel to sea if her rudder had been in really dangerous condition. I do not so interpret their evidence, and perhaps technically the respondent is bound by their admissions. My own inference from this evidence is that these two witnesses merely overdid an effort to establish a character for caution. In spite of what they say, it is extremely difficult to believe that they

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[4](Davis, 370-371.)

really would not have sent the "Isis" on her voyage under tow, even if they had known of a 5° deflection in her rudder blade.

Considerable testimony was directed toward the prudence of sailing from Bremen during the hours of darkness. All of this testimony shows only what is fairly obvious, namely, that any navigation is performed with somewhat more facility under favorable than unfavorable light conditions. The question of light, however, is only one of numerous other conditions governing the voyage of the "Isis" down the Weser River. The reasons for sailing at night advanced in the testimony taken at Hamburg,[1] and in the captain's deposition,[2] are that the traffic in the river was lighter [fol. 659] at night than in the daytime and the tidal conditions were best about 1 a. m., a little after low water, because the vessel would thus have a head current in the upper reaches of the river and higher water some hours later when reaching shoal places in the lower river. It is clear from the testimony in Exhibits 13 and 14 and from the charts, Exhibits 8 and 9, that the channel of the Weser River was very well provided with range lights placed quite close together on both sides.

I think the clear preponderance of the evidence is that if the "Isis" was seaworthy to sail in the daytime, she was seaworthy to sail when she did.

I, therefore, conclude that the "Isis" was not unseaworthy on sailing from Bremen under the conditions under which she actually did sail, including the assumption that she had a deflection in her rudder blade of 5° in the lower half, which was unknown to those in charge of her. In reaching this conclusion I have not been influenced by the evidence submitted by the respondent tending to show that other vessels, in other places, at other times, under other circumstances, with other issues at stake, have been safely towed, because on familiar principles this evidence is of little or no probative value on the issue of whether or not the "Isis" was seaworthy or whether it was prudent to sail her under the actual circumstances of this case.

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[1] (Exhibit 13.)

[2] (Exhibit 14.)

IX. Due Diligence

In so far as due diligence to make the "Isis" seaworthy [fol. 660] may become material, there is no question that in general the measures taken by the owner at Bremen were reasonable and adequate, but I find that the respondent has not sustained the burden of proving that the examination of the rudder at Bremen was adequate and would have revealed the bend in the rudder blade if it in fact existed at that time.

While the cargo was being discharged the rudder was examined by a diver who, according to the testimony of the other witnesses, reported that he found nothing wrong. When the vessel was put in drydock, she was not taken completely out of water, the level of which was reduced so as to expose about 12 feet of the upper part of the rudder, the lower 3 feet remaining under water. The exposed part of the blade, that is about 12 feet, was found sound.[1] The captain apparently saw only about half of the rudder, which was also sound.[2] The dockmen, Menck and Wuhrmann, apparently made rather a superficial examination.[3] Another witness made some sort of an examination with a boathook.[4] Other efforts to ascertain the condition of the part of the rudder under water were made, which are interpreted by the respondent as accurate tests by a straight-edge and by the libellant as random pokes with sticks and boathooks. The respondent's witness admitted that the condition which he afterwards found could not have been ascertained in this way.[5]

[fol. 661] The effect of the testimony suggested by the above references is, to say the least, unconvincing. But the respondent's contention is further seriously damaged by the fact that it must have been dark, or very nearly dark, by the time the dock was pumped out and the examination made. Indeed, it is conceded that artificial illumination was used in a more or less ineffectual effort to ascertain the true

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[1] (Exhibit 13, Reichenbacher, 24; Menck, 60.)

[2] (Exhibit 14, Krueger, 11, 17, 61-62, 66, 85-86.)

[3] (Exhibit 13, Menck, 60-61; Wuhrmann, 64.)

[4] (Exhibit 13, Schubert, 110.)

[5] (Exhibit 13, Asmus, 113-114.)

condition of the rudder blade. (Exhibit 14, Krueger, 60, 61.)

The respondent's witnesses gave no explanation of why the rudder was not lifted and the libellant submitted evidence that this course was practical and prudent. Indeed, Captain Davis thought it would have been better to leave the rudder entirely loose or to take it off altogether.

This examination left uncertain too much concerning the condition of the rudder blade to be adequate within the very strict rule to which the authorities adhere. One citation should suffice.

In Julia Luckenbach (1912), 200 Fed. 976 (2 C. C. A. 1916), 235 Fed. 388 (1918), 248 U. S. 139, a plate deteriorated from the action of salt water and sugar which gained access to the plate through a crack in the cement. The crack was in a peculiarly difficult place to observe and the particular region could not be examined without taking up the permanent ceiling. If the cement had been broken, the search, which was made with lights, would have revealed it, but if it was merely cracked or loose, the defect could not have been discovered without taking up the permanent ceiling, which was not done. Judge Hough held that even though the defect was more difficult to discover than that discussed in Alvena (1896), 74 Fed. 252, 255 (2 C. C. A., 1897), 79 [fol. 662] Fed. 973, due diligence had not been exercised to make the "Luckenbach" seaworthy. See also Friesland (1900), 104 Fed. 99; Manitou (1902), 116 Fed. 60; Poleric, 1927 A. M. C. 346, 17 F. (2d) 513 (4 C. C. A.), 1928 A. M. C. 761, 25 F. (2d) 843.

The respondent's position is not helped by the voluminous testimony concerning the approval of Hamburg underwriting interests; for the requirement is diligence with respect to the vessel, not in obtaining certificates. Abbazia (1904), 127 Fed. 495, 496; Compagnie Maritime Francaise v. Meyer (9 C. C. A., 1918), 248 Fed. 881, 885; Negus, 1923 A. M. C. 625, 298 Fed. 749, 751, affirmed per curiam (2 C. C. A., 1924), 298 Fed. 752. These cases arose under the Harter Act, but there is no reason to relax the stringency of the requirement in respect of the Jason clause.

The respondent contends that it is not liable for any negligent act of its agent at Bremen in connection with management provided it supplied a competent agent. In support

of this theory cases arising under the limitation of liability statutes are cited.

These cases are not in point because under petitions for limitation of liability the issue is the privity or knowledge, actual or imputed, of the owner, and hence the method by which the owner delegates supervision is important. Thus, if the owner has selected a competent and adequate agent, he cannot be said to be privy to a negligent act committed by the agent without his knowledge. Annie Faxon (9 C. C. A., 1896), 75 Fed. 312; Quinlan vs. Pew (1 C. C. A., 1893), 56 Fed. 111; Tommy (2 C. C. A., 1907), 151 Fed. 570, 573. But the duty to exercise due diligence to make a vessel seaworthy is a non-delegable one; and, hence, if a competent [fol. 663] agent fails to use due diligence to make a vessel seaworthy, the owner has not used such diligence. Int. Nav. Co. vs. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218; Dobell vs. Steamship Rossmore Co. [1895], 2 Q. B. 408; Flamborough (1895), 69 Fed. 470; Nord-Deutscher Lloyd vs. President, etc., of Ins. Co. of N. A. (4 C. C. A., 1901), 110 Fed. 420, 425.

An inspection is not sufficient unless it is adequate. If the defect could have been discovered by an adequate inspection, the failure of the appointed representative of the owner to make the inspection makes the owner liable. Friesland (1900), 104 Fed. 99; Manitou (1902), 116 Fed. 60; Poleric, 1927 A. M. C. 396, 17 F. (2d) 513 (4 C. C. A.), 1928 A. M. C. 761, 25 F. (2d) 843; Julia Luckenbach (1912), 200 Fed. 976 (2 C. C. A., 1916), 235 Fed. 388 (1918); 248 U. S. 139. Therefore, I find and advise the Court that the respondent has not sustained the burden on it of proving that due diligence was used to ascertain the actual condition of the steering gear of the "Isis" before sailing from Bremen. This finding is, of course, immaterial to the result unless the Court should not accept the previous finding that the vessel was in fact seaworthy.

But even on the assumption that the "Isis" was in fact unseaworthy and, in addition, that due diligence had not been exercised to make her seaworthy, it remains to determine whether for the purposes of the Jason clause the exercise of due diligence is performed once and for all at the beginning of a voyage or whether due diligence must be re-exercised, so to speak, at the port of Bremen for the trip from there to Hamburg.

[fol. 664] X. The Owner's Obligation at an Intermediate Port

So far as I am aware, there are not any decisions interpreting the Jason clause in this respect, but no reason has been suggested why the principle of the analogous decisions on the exercise of due diligence under the Harter Act should not govern the present case.

Where a vessel is concededly seaworthy when she sails on her voyage and an unseaworthy condition due to storm is not sufficiently corrected by the master at some intermediate port, the owner is not deprived of his defense under Section 3 of the Harter Act. Guadeloupe (1899), 92 Fed. 670; United States v. New York & O. S. S. Co. (2 C. C. A., 1914), 126 Fed. 61; Milwaukee Bridge (2 C. C. A., 1928 A. M. C. 1063, 26 F. (2d) 327, 330.

But the libellant contends that it is otherwise where the owner personally intervenes by exercising some supervision and control over the action at the intermediate port.

As the requirement of due diligence under the Harter Act is an absolute one on the owner and cannot be delegated, the character of the particular individual performing the duty does not make any difference. It is, therefore, difficult to see how the discharge of the owner's duty, if any, in this regard at an intermediate port can be made to depend on whether the decision to sail the "Isis" in the condition in which and at the time when she did sail was made by the head office of the respondent,[1] or whether the decision and control of activities at Bremen was vested in the owner's marine superintendent,[2] or whether the captain deferred to the authority of his marine superintendent.[3] If [fol. 665] there were a breach of any duty, it must have been a non-delegable duty and hence the question presented comes back to the time at which that duty of due diligence must be exercised in order to satisfy the condition of the statute and the Jason clause.

[1] (Exhibit 13, Brandt, 9) [2] (Exhibit 13, Reichenbacher, 31-32) [3] (Exhibit 13, Reichenbacher, 31; Exhibit 14, Krueger, 119, 121).

At least as far as concerns the Harter Act, it is too well settled for discussion that this time is before sailing on the voyage.

The libellant contends that the voyage of the "Isis" should be regarded as a voyage in stages and that the vessel must be seaworthy at the beginning of each stage; and cites a dictum in Valentine (1904), 131 Fed. 352, and the decision by the Circuit Court of Appeals for the Third Circuit in Willdomino (3 C. C. A.), 1924 A. M. C. 889; 300 Fed. 5.

While perhaps some of the language of the Court in Valentine is susceptible of the interpretation placed on it by the libellant, it is quite evident from the facts of the case that the fault resulting in the loss, while operating at destination, was not initiated there, but at the inception of the voyage; and the owner was held liable because the default of the crew of the lighter related back to the nondelegable duty of the owner at the beginning of the voyage. The default of the owner in Willdomino also arose at the inception of the voyage. Moreover, the theory of the Circuit Court of Appeals in that case was based on the English stages-of-voyage doctrine, to which further reference will now be made.

The stages-of-voyage doctrine, developed in Vortigern, [1899] P. 140, is a relaxation of the strict warranty of sea- [fol. 666] worthiness rather than an additional restriction. The doctrine does not necessarily require a vessel to be seaworthy on sailing from every intermediate port but gives the shipowner the alternatives of either having the vessel fit at the very beginning for the entire intended voyage, or of having her fit for the first and each ensuing stage of the voyage at the time when she enters on each stage. (Carver, Carriage of Goods by Sea, 7th ed., §19b.) This does not increase the extent of the warranty of seaworthiness, but merely allows the shipowner some latitude in the performance or fulfillment of the warranty. The doctrine arises out of the practical impossibility of fitting a vessel at the outset for a long and complicated voyage, and cannot properly be used for the purpose of increasing the owner's difficulties. Vortigern [1899] P. 140, 159-160; Thin vs. Richards [1892], 2 Q. B. 141, 144.

As the "Isis" was concededly in every way fitted for the intended voyage, which was not in stages, when she sailed

from the last port of loading, the owner's warranty of seaworthiness was thereupon performed and discharged. No sufficient reason has been suggested to increase the extent of the owner's obligation in performing the condition of the Harter Act and the Jason clause beyond his ancient strict warranty.

Indeed the Circuit Court of Appeals for this Circuit, while accepting the English stages-of-voyage doctrine, has held that if the vessel is seaworthy on sailing on her intended voyage, all adjustments made necessary by subsequent events "pertain to her management and cannot touch her seaworthiness." Steel Navigator (2 C. C. A.), 1928 A. M. C. 388, 23 F. (2d) 590, 592; Oritani, 1930 A. M. C. 230, 40 F. (2d) 522, 525; Cf. Newport (9 C. C. A.), 1925 [fol. 667] A. M. C. 1193; 7 F. (2d) 452, 453; President Polk, 1930 A. M. C. 437, 40 F. (2d) 665, 667.

Therefore, when the "Isis" sailed from her last loading port in seaworthy condition for the intended voyage, whatever was done at Bremen in the prosecution of the voyage related to navigation and management, rather than to the discharge of the owner's duty of seaworthiness or the exercise of due diligence to make her seaworthy; and, hence, irrespective of what construction be placed on what transpired at Bremen, and even though it should ultimately be determined that the vessel on sailing from Bremen was unseaworthy and that due diligence to make her seaworthy at Bremen had not been exercised, the respondent had discharged his duty under the Harter Act and was entitled to the protection of the Jason clause. As I see no reason for a more strict construction against the owner of the Jason clause than of the Harter Act, I find and advise the Court that when the vessel finally broke ground for the voyage at her last loading port in seaworthy condition and in all respects properly manned, equipped and supplied for the intended voyage, the general average clauses in the bills of lading were brought into operation; that nothing which occurred thereafter deprived the owner of the right given him by the Jason clause to recover a contribution to general average sacrifices occasioned by the two strandings in the Weser River; and that the general average deposits made as security therefor were demanded and given in accordance with, and not in breach of, the contracts of carriage.

[fol. 668] XI. Conclusion

At the outset of the trial I suggested that unless the damages were complicated or would involve difficulties or delay in producing evidence, proofs concerning both merits and damages should be heard by me, as my interpretation of Judge Woolsey's order permitted such procedure and the ultimate disposition of the case would be expedited thereby. It developed, however, that neither proofs nor accurate information concerning the exact amounts of the deposits and of refunds which had been made thereon were immediately available and the parties thereupon asked that only the merits be heard on this reference.

The general average deposits originally required were on the basis of approximately 20% of the estimated contributory values.[1] The adjusters found that the total general average arising out of both first and second strandings was 9.045%.[2] The respondent does not dispute its obligation to return to the libellant all sums deposited, with interest, in excess of the net amounts found to be due by the adjusters. In fact, the libellant states that a part of such excess has already been returned.[3] Both parties are now seeking to obtain exact information, but at the present time neither can state exactly what the excess is and thus there is not any evidence in this record on which damages may be computed, irrespective of what the ultimate decision may be on the merits.

I think the case must be disposed of either by dismissing the libel, but making the entry of the final decree dismissing the libel contingent on the payment by the respondent [fol. 669] of the balances concededly due, or by the entry of an interlocutory decree for the libellant for the excess of each deposit over the amount found due from the respective parcels of cargo according to the statement of the adjusters. (Exhibit 16.)

Aside from the procedural novelty of the former alternative, it seems to me that as the libels allege and as the respondent has stipulated[4] that the libellant is the assignee

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[1] (Trial Minutes, 175-176.)
[2] (Exhibit 16.)
[3] (Trial Minutes, 176.)
[4] (Exhibits C-G, inclusive).

of all right, title and interest in and to the deposits, and any cause of action against the respondent by reason of the demand and collection of the deposits, the libellant is entitled to a decree for the balance of the deposits and I, therefore, advise the Court that an interlocutory decree for the libellant should be entered for such excess.

No reason has been suggested why the respondent should not pay interest on the money, of the use of which the libellant has been deprived. I, therefore, advise the Court that the recovery of the libellant should carry interest on the balance of each deposit from the time when it was made.

In view of the decision on the merits, I advise the Court that the libellant should be regarded as the unsuccessful party and, hence, in accordance with the order of reference, costs should be decreed in favor of the respondent.

Respectfully submitted.

Mark W. Maclay, Special Commissioner.

New York, January 27, 1931.

[fol. 670] APPENDIX

A. Findings of Fact

1. All the facts specifically stated in sections "I. Statement," and "II. The Facts," of the Special Commissioner's report.

2. The proximate cause of the stranding which gave rise to the general average expenditures was negligent navigation in proceeding too fast and too close to the starboard bank of the channel at or about the time of passing the upbound vessel.

3. The injury consisting of a 5° set in the rudder blade was not a contributing cause of the second stranding. If the injury existed, and further if it was sufficient to affect at all the steering of the "Isis", the power of her engines and the tugs was adequate to correct any tendency to sheer, and there was in fact no difficulty in controlling the "Isis" until near kilometer 17.

4. The injury to the rudder blade itself consisted of a set or bend beginning about the middle or below the middle of the rudder and running to a maximum of about 5° from the median line of the vessel at the extreme bottom of the

rudder. This injury existed at the time of the second docking at Bremen. There is not any direct evidence that it existed or was known or thought to exist at any time prior to the second docking. The injury may have been caused by the first stranding. It probably could not have been caused by the second stranding. It might have been due to some occurrence on the two trips up the river and the [fol. 671] one trip down the river, but there is no evidence of any such occurrence. It has not been established by the preponderance of the evidence that the injury to the rudder blade in fact either existed or did not exist at the time the vessel sailed from Bremen. The origin of the injury is left to conjecture.

5. The preponderance of the direct evidence, the manoeuver book (Exhibit 7), and the report of the Seeamt investigation (Exhibits A and B) is that the "Isis" did not develop any marked tendency to sheer to starboard on the way down the river before the second stranding; and that if there was any such tendency to sheer, the power of the vessel and her tugs was amply sufficient to correct it and to control the vessel.

6. The testimony, expert and otherwise, regarding the question of whether or not a force sufficient to twist the rudder stock 45° would necessarily have bent the rudder also is unconvincing and is insufficient to form the basis of a definite affirmative or negative finding in this regard.

7. The testimony, expert and otherwise, regarding the question of whether or not a contact sufficient to produce the bend found in the lower part of the rudder blade would have shown its effect on either the wire lashings or the quadrant or both is unconvincing and is insufficient to form the basis of a definite affirmative or negative finding in this regard. The preponderance of the evidence is that neither the quadrant nor the wire lashings showed any evidence of movement or disturbance between the time they [fol. 672] were put on, when the "Isis" sailed from Bremen, and the time of the second stranding near Vegesack.

8. If the injury to the rudder blade either existed or did not exist in fact when the vessel was drydocked at Bremen, she was seaworthy for the intended voyage in tow of the tugs described with her rudder lashed amidships.

9. As between the "Isis" in tow of the three tugs, one ahead and one on each quarter opposite the No. 4 hatch, with her rudder lashed amidships, and the vessel unassisted by tugs with her entire steering gear in working order, the former arrangement provided control and manoeuvering power which was clearly superior in congested water and at any speed up to 5 or 6 miles per hour through the water, was equal at about 5-7 miles per hour, but was inferior at higher speeds and in open waters.

10. Although the advantages of navigating in daylight as compared with darkness are obvious, the owner was not negligent in permitting the vessel to sail at 1 a. m. on February 10th. The judgment to be exercised in determining the relative advantages and disadvantages of light, tide, current, weather conditions, traffic, and the like, should primarily be that of a local pilot. The evidence is clear that the vessel sailed when she did in accordance with the advice and under the direction of a properly selected local pilot.

11. Due diligence was not exercised to ascertain the true condition of the rudder at Bremen in that, (a), the rudder [fol. 673] could as a practical matter have been taken off altogether for examination or repair; (b), the rudder was not wholly exposed by the examination which was made; (c), the examination was made under unfavorable conditions in the twilight or early evening darkness, and (d), the examination was made without the attendance of a classification or independent surveyor.

B. Conclusions of Law

1. Paragraph 20 of the Punta Arenas form of bill of lading, Exhibits 10-15, inclusive, attached to the libel in Action No. 1, is valid and enforcible so as to permit the shipowner to recover a contribution to general average expenses necessitated by a negligent stranding, provided the "Isis" was either seaworthy or due diligence had been exercised on that behalf, and is not invalidated in the sense of being rendered wholly void by the absence from the bill of lading of an express proviso that the vessel should be seaworthy or due diligence exercised in that behalf. The shipowner, therefore, derives similar rights to contribution in general average from paragraph 20 of the Puntas

Arenas form of bill of lading and from paragraph 7 of the form of bill of lading under which all the other cargo was shipped.

2. As the respondent refused to deliver any of the cargo unless deposits to secure general average contribution were made, the making of such deposits by the libellant's assignors was not a voluntary payment.

3. Admiralty has jurisdiction of these suits for the alleged breach of the carrier's contract in the bills of lading [fol. 674] to deliver the cargo at destination free of liens or charges except those properly incurred.

4. The departure of the "Isis" from Bremen in tow under the circumstances of this case, irrespective of whether or not she were seaworthy at that time was not a deviation.

5. Seaworthiness required as a condition of the application of the Jason clause and of Section 3 of the Harter Act is not seaworthiness in every conceivable regard, irrespective of causal connection with the disaster giving rise to the general average. Such causal connection is necessary for the defeat of the shipowner's right either to recover a general average contribution from the cargo under the Jason clause or to claim the protection of Section 3 of the Harter Act.

6. As the requirement of due diligence under the Jason clause and the Harter Act is a non-delegable one, whether the owner attempts to discharge this duty himself or through agents or employees, any failure in discharge is chargeable to the owner.

7. The owner's duty under the Jason clause and the Harter Act to make the vessel seaworthy or to use due diligence to that end, like the warranty of seaworthiness, refers to the time of breaking ground for the intended voyage, and did not place on the owner of the "Isis" any additional duty in respect of seaworthiness or due diligence when the vessel sailed from Bremen.

[fol. 675] IN UNITED STATES DISTRICT COURT

[Title omitted]

LIBELLANT'S EXCEPTIONS TO REPORT OF SPECIAL COMMISSIONER

The libellant excepts to the report filed by the Special Commissioner herein in the following particulars:

1. In that the Commissioner found that the "Isis" was seaworthy when she sailed from Bremen.

2. In that the Commissioner found that even if the bend in the ship's rudder existed at the time the "Isis" sailed from Bremen, it was immaterial and unimportant.

3. In that the Commissioner accorded no weight to the testimony of the respondent's own witnesses, the master of the vessel and the respondent's marine superintendent, that the bend found in the rudder was dangerous and "that they would not have sent the vessel on her voyage to Hamburg if they had thought that the rudder of the 'Isis' was [fol. 676] in the condition it was afterwards found to be" (quoting the commissioner's language); but chose to rely on the testimony of opinion witnesses who did not see the rudder of the "Isis" and who had no familiarity with navigation in the Weser River, that the bend was immaterial.

4. In that the Commissioner found that the theory that the sheer which led to the stranding near Vegesack was caused by the bent rudder, "rests entirely in conjecture".

5. In that the Commissioner found that between Bremen and the place of stranding near Vegesack, the "Isis" was navigated at too high a speed and too near the bank.

6. In that the Commissioner found that the "Isis" was navigating at a speed of between 6-8 knots per hour when she passed an ascending vessel.

7. In that the Commissioner found that before the "Isis" "was entirely clear of this vessel (the ascending vessel) she sheered to starboard in spite of the efforts of the tugs and her engines, and while out of control, she was caught by the current on the port bow in such a way as to strand hard and fast about amidships on the sand spit separating

the junction of the Weser and Lesum Rivers, near Vegesack"; and in that the Commissioner found that the stranding "followed closely after passing the upbound vessel"; although

(1) there is no evidence of any kind that the "Isis" [fol. 677] sheered just before being clear of the ascending vessel, the respondent's master and its only witness concerning the navigation of the "Isis" at the time, testifying that the vessel was voluntarily swung to starboard to give passageway to the ascending vessel, and after the ascending vessel was passed it was found impossible to bring the ship back into the center of the channel;

(2) the respondent's own evidence, which is the only evidence on the matter, establishes that the "Isis" passed the ascending vessel above or at Kilometer 17 and that the point where the "Isis" stranded was approximately 2400 feet, or about four-tenths of a mile, below Kilometer 17; and the master testified that the stranding occurred twelve minutes after the passing of the ascending ship.

8. In that the Commissioner found that the high speed at which he said the "Isis" was being navigated at the time she passed the ascending vessel, would cause the vessel to sheer toward the bank, although there is no evidence suggesting any reason why the vessel should sheer toward the bank rather than away from the bank, except the bent condition of the rudder.

9. In that the Commissioner found that by reason of faulty navigation the "Isis" "smelt" the starboard bank while passing the ascending vessel or immediately thereafter, and that this led to the vessel sheering, although there is not the slightest evidence to support such a finding; and the testimony of the master who was the only witness in [fol. 678] relation to the navigation of the ship at the time, indicates the contrary.

10. In that the Commissioner relied on the evidence that the "Isis' stopped her starboard engine and dropped the starboard tugboat, because of fear of fouling the chain of a buoy at the junction of the Lesum and Weser Rivers, as some proof that the vessel "smelt" the bank at Kilometer 17, about one-third of a mile up the river from the junction of the two rivers.

11. In that the Commissioner found that if the "Isis" sheered, the power of the tugs and the power available on the vessel should have been sufficient to break it, and that, therefore, the ship was seaworthy.

12. In that the Commissioner found no evidence that the "Isis" sheered prior to reaching Kilometer 17.

13. In that the Commissioner relied on the maneuver book offered in evidence by the respondent, as showing no tendency of the "Isis" to go to starboard prior to the disaster.

14. In that the Commissioner found that the "Isis" stranded as the result of

"negligent navigation in proceeding too fast and too close to the starboard bank of the channel at or about the time of passing the upbound vessel and that unseaworthiness, if any, in respect of the steering gear of the "Isis" did not cause or contribute to the stranding."

[fol. 679] 15. In that the Commissioner found that there is abundant evidence on either side of the question as to whether or not the rudder became bent as a result of the first stranding and that "the origin of the injury is left to conjecture", although (1) there is no evidence supporting any suggestion that there was any bend in the rudder prior to the first stranding; (2) the Commissioner found that the force of the blow in the first stranding was on the port side of the rudder; (3) immediately after the first stranding the ship sheered violently to starboard; (4) the bank which the Commissioner conjectured the vessel may have "smelt" was to starboard; (5) the after part of the vessel was afloat during all the time of the second stranding; (6) the rudder was subsequently found bent to starboard.

16. In that the Commissioner held that the testimony is insufficient to establish that any touching of bottom sufficient to bend the rudder would show "its effect on either the wire lashings or the quadrant or both", although the respondent's witness, the chief officer of the ship, who made fast the lashings and examined them and the quadrant, testified definitely that any touching of bottom would affect the lashings and the quadrant, and the only testimony to the

contrary is that of opinion witnesses who never saw the ship or the conditions.

17. In that the Commissioner found that if the vessel was seaworthy for a voyage starting in the daytime, she was equally seaworthy for a voyage starting in the night time.

18. In that the Commissioner held that the respondent is relieved from liability in reference to any fault of the [fol. 680] "Isis" in sailing in the night time, because that action was taken on the advice and under the direction of a pilot.

19. In that the Commissioner refused to give any weight to the record of the testimony given before the German Court of Inquiry known as Seeamt, formed to investigate this disaster, although that record shows that the master and other of the respondent's witnesses then testified inconsistently with their testimony in this case.

20. In that the Commissioner based many of his findings of fact on his assumptions and speculations not supported by any evidence and frequently opposed to the testimony of the respondent's own fact witnesses who were familiar with the actual conditions.

21. In that the Commissioner found that the diver sent down to examine the rudder while the vessel was at Bremen prior to the second stranding, found nothing wrong with the rudder when the diver was not called as a witness and the only evidence on the matter is that he reported that he had found nothing wrong with it.

22. In that the Commissioner found that the "Isis" was not guilty of an unjustifiable deviation although she sailed from Bremen in the night time with her rudder lashed and in tow of tugs, and that action was taken under the direct orders of one of the respondent's executive officers.

23. In that the Commissioner found that there must be a causal relation between unseaworthiness and the disaster [fol. 681] to take from the respondent the right to the exceptions provided by Section 3 of the Harter Act; and to cause a breach of the condition of the bill of lading Jason clause.

24. In that the Commissioner found that, if the "Isis" was in all respects seaworthy at the respective ports of loading, even if she became unseaworthy at Bremen and sailed in that condition under the orders of the respondent's executive officers who had full knowledge of the conditions under which she was sailing, the error in sailing under those conditions relates "to navigation and management rather than to the discharge of the owner's duty of seaworthiness or the exercise of due diligence to make her seaworthy", and the respondent may still avail itself of the exemptions of Section 3 of the Harter Act; and that the conditions of the Jason clause have not been breached.

25. In that the Commissioner found that the clause in relation to general average appearing in the bills of lading issued at Punta Arenas sets out a valid agreement that the cargo shall be liable to contribute in general average in relation to a casualty resulting from negligence in navigation.

26. In that the Commissioner found that all the general average deposits sued for were demanded in accordance with the contracts of carriage and in accordance with law.

27. In that the Commissioner found that the libellant is not entitled to recover all the deposits required to be made by the respondent as a condition precedent to delivery of the cargo involved in the suits, with interest, and held that the libellant may only recover the excess of the deposits [fol. 682] over the amounts found to be due from the respective cargo interests in the two general average adjustments, with interest.

And the respondent excepts to each and every portion of each of the above findings and conclusions of the Commissioner.

Wherefore the libellant prays that its said exceptions may be sustained and that decree be entered for the libellant and for such other and further relief as justice may require.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENT'S EXCEPTIONS TO REPORT OF SPECIAL COMMISSIONER

The respondent hereby excepts to the report heretofore filed by the Special Commissioner herein in the following particulars:

1. In that the Commissioner omitted, evidently by inadvertence, to find that the "Isis" was in all respects sea- [fol. 683] worthy and properly manned, equipped and supplied at the time when she sailed from each of her ports of loading.

2. In that the Commissioner found that the estimates of the captain of the "Isis" of her position at the time of various engine movements were not convincing.

3. In that the Commissioner omitted to find that the stranding of the "Isis" was due, not only to her smelling the bank on the starboard side of the channel, but also to her negligent failure to wait, before approaching the bend in the river, until the upbound steamer should have passed.

4. In that the Commissioner found that it was not likely that the bend in the rudder blade occurred at the time of the second stranding, and that there was no evidence that the rudder blade struck anything on the port side at that time.

5. In that the Commissioner found that the respondent had not sustained the burden of proving that the 5% deflection in the rudder did not exist at the time when the vessel left Bremen.

6. In that the Commissioner found that the respondent had not sustained the burden of proving that the examination of the rudder of the "Isis" was adequate and that it would have revealed the bend in the rudder blade, if it in fact existed at that time.

7. In that the Commissioner found that the respondent had not showed that due diligence was used to ascertain the

[fol. 684] condition of the rudder of the "Isis" before she left Bremen.

8. In that the Commissioner held that a shipowner who has selected a competent agent to inspect a vessel and make her seaworthy is nevertheless responsible if the agent fails to use due diligence.

9. In that the Commissioner held that the requirement of due diligence under the Jason clause and the Harter Act is non-delegable, and that, whether the owner attempts to discharge this duty himself or through agents or employees, any failure in doing so is chargeable to the owner.

10. In that the Commissioner found that the respondent did not dispute its obligation to return to the libelant all sums deposited in excess of the amounts due with interest, but failed to qualify that finding by restricting the interest to the rate customarily allowed at Hamburg on general average deposits.

And the respondent excepts to each and every portion of each of the above findings and decisions of the Commissioner.

Wherefore the respondent prays that said exceptions may be sustained and the Commissioner's report be corrected accordingly, and that thereupon the report be confirmed.

Haight, Smith, Griffin & Deming, Proctors for Respondent, 27 William Street, New York City.

[fol. 685] In United States District Court, Southern District of New York

Louis H. May, Libelant,

against

Hamburg-Amerikanische Packetfahrt, Respondent

(5 Actions)

In Admiralty. Exceptions filed by libellants and respondent to report of special commissioner appointed to

hear the evidence and report his conclusions on the causes of action in five suits brought by separate libellants against the same respondent, which were subsequently consolidated.

Bigham, Englar, Jones & Houston (H. L. Longley, of counsel), Proctors for Libellant;

Haight, Smith, Griffin & Deming (John W. Griffin, Wharton Poor, of counsel), Proctors for Respondent;

MEMORANDUM OF COLEMAN, D. J.

F. J. COLEMAN, J.:

The five suits which have been consolidated were brought by different cargo owners against the carrier to recover cash deposits exacted by the carrier as a condition to the delivery of the cargo. The deposits were demanded for the purpose of covering general average contributions claimed by the carrier from the cargo owners because of stranding and damage to the vessel while on the voyage. [fol. 686] Upon the consent of all the parties the suits were referred to a special commissioner to hear the evidence and report his conclusions thereon, but with the express provision that the report should be advisory only and should not be construed as a determination of the issues. The reference was not only consented to, but it is undisputed that the parties themselves selected the special commissioner. After prolonged hearings at which more than 300 pages of testimony were taken and numerous depositions and documents marked in evidence, the special commissioner filed a report in favor of the respondent on the merits of the controversy. To this report both sides have filed exceptions, but those of the respondent relate only to certain special findings which need not be considered if the report is confirmed.

In view of the special commissioner's very careful and comprehensive report it is unnecessary to restate all the facts. Only three questions need be considered, (1) whether the vessel was seaworthy when she departed from Bremen, (2) whether this departure under all the circumstances constituted a deviation and (3) whether the general average clause of the bills of lading covering the "Punta Arenas" shipment was valid.

(1) The special commissioner found that the bend in the rudder blade neither caused the stranding nor rendered the

vessel unseaworthy. It is unnecessary at this time to determine whether unseaworthiness which did not contribute to the damage should deprive the respondent of the advantages of the general average clause, because if the vessel was in fact seaworthy it is undisputed that subject to the two other questions mentioned above the libellants can- [fol. 687] not recover.

The bend in the rudder consisted of a deflection of 5° at the bottom, tapering to about half way up the blade where it disappeared. The rudder was lashed amidships without making any allowance for this deflection and the vessel assisted by three tugs, one on each quarter and one ahead, with her own twin propellers in operation, was sent from Bremen at night to navigate the tortuous channel of the River Weser to the North Sea and thence to Hamburg. Furthermore, no one was aware of the deflection of the blade and consequently no allowance for it could have been made in navigation. The river was well lighted and traffic and tide conditions were more favorable than they would have been by day.

The question whether under all the circumstances the vessel was reasonably fit for the voyage on which she was sent was purely one of fact which the special commissioner carefully considered. He based his finding to some extent upon the appearance and bearing of the various witnesses who testified before him, as he plainly states in his report. It is impossible to tell from the transcript of the testimony whether he was mistaken in his estimate of these witnesses. The whole purpose of the reference would be lost if the Court were under the obligation of deciding the question de novo, which would be particularly inappropriate where the parties not only consented to the reference, but selected the special commissioner.

It is impossible for me to see that the finding of the special commissioner is against the weight of the evidence, but, on the contrary, it appears to be amply justified if the respondent's experts were more credible than the libel- [fol. 688] lant's. The crucial question was what degree of effect so slight a deflection of the rudder blade would have under the circumstances, and if the respondent's experts were correct, it was negligible, as the special commissioner found. The evidence to the contrary, including the am-

biguous admissions of certain of the respondent's witnesses, would have to yield to a belief in the reliability of the respondent's experts.

(2) The contention that the departure from Bremen under the circumstances constituted a deviation is untenable. There was, of course, no change in route, nor was there any increase of risk beyond that contemplated in the contract of affreightment. A change was made in the method of navigation which consisted of having the vessel continue under her own power but assisted by three tugs instead of steered by her own rudder. The new arrangement was caused by accident, and was reasonably necessary in view of the conditions in Bremen; furthermore it left the vessel seaworthy for the trip to Hamburg. To hold that it constituted a deviation which abrogated the express contract would be to go beyond any of the decisions which have been cited.

(3) As to the "Punta Arenas" shipments libellants suggest rather than argue that the general average clause is void because it does not expressly contain what the law would otherwise read into it. This places technicality and formalism above substance, and I think the special commissioner was correct in rejecting it.

———, U. S. D. J.

October 27, 1931.

[fol. 689] In United States District Court

Nos. 102-296, 102-128, 102-155, 103-353, 105-360. Consolidated by Order of Jan. 13, 1931

Louis H. May, Libelant,

against

Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, Respondent

(5 Libels)

Final Decree—Feb. 16, 1932

This cause having been duly referred, by order dated December 2, 1930, to Mark W. Maclay, Esq., as Special Commissioner, to hear the evidence adduced by the respective

parties, and to report his conclusions thereon to the Court, and the said Commissioner having duly heard the testimony and the arguments upon the pleadings and proofs on December 22nd and 23rd, 1930, and having rendered his report to the Court with findings of fact and conclusions of law on January 27, 1931, and the libelant and the respondent [fol. 690] having filed certain exceptions to the said Commissioner's report, the findings of fact and the conclusions of law, and the exceptions having duly come on to be heard on the 21st day of March, 1931, upon the pleadings and proofs and upon the said Commissioner's report, findings of fact and conclusions of law, and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its decision on October 27, 1931, to the effect hereinafter stated, and respondent's costs having been duly taxed at the sum of $1050.52, now, on motion of Haight, Smith, Griffin & Deming, proctors for the respondent, it is

Ordered that the exceptions filed by the libelant be, and they hereby are, overruled; and it is further

Ordered that the respondent's first exception be, and hereby is, sustained and that the Court finds that the steamship "Isis" was in all respects seaworthy and properly manned, equipped and supplied upon sailing from each of her loading ports; and it is further

Ordered that, in view of the confirmation of the report hereby, the other exceptions of respondent need not be considered; and it is further

Ordered that the report of the Special Commissioner be and the same is hereby confirmed, as supplemented above; and the parties agreeing that the excess of the general average deposits of the libelant's assignors over the contributions set out as due from them pursuant to the adjustment has been refunded, it is

[fol. 691] Ordered, adjudged and decreed that the five libels herein be and each of the same hereby is dismissed with costs, and that the respondent Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft recover of the libellant, Louis H. May and his stipulators for costs in the sum of $1050.52 costs as taxed, which sum shall bear interest until paid, and that the respondent have judgment against the said libellant, Louis H. May, therefor; and it is further

Ordered, adjudged and decreed that, unless an appeal be taken from this decree within the time limited by the rules and practice of this Court, the stipulators for costs on the part of said libellant shall cause the engagement of their stipulations to be performed within such time, or show cause within four days after the expiration thereof, or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels, lands and credits to enforce satisfaction of this decree.

Frank J. Coleman, United States District Judge.

[fol. 692] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto:

1. That inasmuch as the stipulation dated April 12, 1932, and printed at page 32 of this record makes it unnecessary to print Libellant's Exhibits D, E, F and G, the same may be omitted from the record.

2. That Respondent's Exhibits 8, 9, 10 and 16 need not be printed herein, but either party may submit the same to the Court upon the argument of this appeal.

Dated New York, July 6, 1932.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Haight, Smith, Griffin & Deming, Proctors for Respondent.

[fol. 693] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Nos. 102-296, 102-128, 102-155, 103-353, 105-360. Consolidated by Order of January 13, 1931

[Title omitted]

LIBELLANT'S NOTICE OF APPEAL AND ALLOWANCE OF APPEAL

SIRS: Please take notice that Louis H. May, libellant in the above entitled consolidated cause, hereby appeals to the

United States Circuit Court of Appeals for the Second Circuit, from the final decree herein entered in the office of the Clerk of this Court on February 16, 1932, and from each and every part of said decree.

Dated April 7, 1932.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant. Office & P. O. address: 64 Wall Street, New York City.

[fol. 694] To Charles Weiser, Esq., Clerk: Haight, Smith, Griffin & Deming, Esqs., Proctors for Respondent, 27 William Street, New York City.

Allowance of Appeal

The foregoing appeal is hereby allowed.

Dated New York, April 7, 1932.

Francis G. Caffey, U. S. D. J.

[fol. 695] In United States District Court

[Title omitted]

Libellant's Assignments of Error

The libellant assigns error to the opinion and decision of the District Court herein dated October 27, 1931, and to the final decree herein dated February 16, 1932, in the following respects:

1. In that the Court ruled that the issue of seaworthiness should not be decided de novo because it was a question of fact upon which the special commissioner made his finding, based to some extent "upon the appearance and bearing of the various witnesses who testified before him as he plainly states in his report"; although there was but one fact witness who testified before the Commissioner and that witness was asleep at the time of the disaster which the case concerns.

2. In that the Court ruled that "the whole purpose of the reference would be lost if the Court were under the obligation of deciding the question de novo which would be [fol. 696] particularly inappropriate where the parties not

only consent to the reference but selected the special commissioner";

3. In that the Court found that the "Isis" was seaworthy when she sailed from Bremen.

4. In that the Court approved the finding of the Commissioner that even if the bend in the ship's rudder existed at the time the "Isis" sailed from Bremen, it was immaterial and unimportant.

5. In that the Court accorded no weight to the testimony of the respondent's own witnesses, the master of the vessel, and the respondent's marine superintendent, that the bend in the rudder was dangerous and that they would not have sent the vessel on her voyage to Hamburg if they had thought that the rudder of the "Isis" was in the condition it was afterwards found to be; but chose to rely on the testimony of opinion witnesses who did not see the rudder of the "Isis" and who had no familiarity with navigation in the Weser River, that the bend was immaterial.

6. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that the theory that the sheer which led to the stranding near Vegesack was caused by the bent rudder, "rests entirely in conjecture".

7. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that between Bremen and the place of stranding near Vegesack, the "Isis" was navigated at too high a speed and too near the bank.

8. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that the "Isis" was [fol. 697] navigating at a speed of between 6 8 knots per hour when she passed an ascending vessel.

9. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that before the "Isis" was entirely clear of this vessel (the ascending vessel) she sheered to starboard in spite of the efforts of the tugs and her engines, and while out of control, she was caught by the current on the port bow in such a way as to strand hard and fast about amidships on the sand spit separating the junction of the Weser and Lesum Rivers, near Vegesack; and in that the Court failed to sustain the libellant's exception to the Commissioner's finding that the

stranding "followed closely after passing the upbound vessel", although

(1) there is no evidence of any kind that the "Isis" sheered just before being clear of the ascending vessel, the respondent's master and its only witness concerning the navigation of the "Isis" at the time, testifying that the vessel was voluntarily swung to starboard to give passage-way to the ascending vessel, and after the ascending vessel was passed it was found impossible to bring the ship back into the center of the channel;

(2) the respondent's own evidence, which is the only evidence on the matter, establishes that the "Isis" passed the ascending vessel above or at Kilometer 17 and that the point where the "Isis" stranded was approximately 2400 [fol. 698] feet, or about four tenths of a mile, below Kilometer 174 and the master testified that the stranding occurred twelve minutes after the passing of the ascending ship;

10. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that the high speed at which he said the "Isis" was being navigated at the time she passed the ascending vessel, would cause the vessel to sheer toward the bank, although there is no evidence suggesting any reason why the vessel should sheer toward the bank rather than away from the bank, except the bent condition of the rudder.

11. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that by reason of faulty navigation the "Isis" "smelt" the starboard bank while passing the ascending vessel or immediately thereafter, and that this led to the vessel sheering, although there is not the slightest evidence to support such a finding; and the testimony of the master, who was the only witness in relation to the navigation of the ship at the time, indicates the contrary.

12. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that the evidence that the "Isis" stopped her starboard engine and dropped the starboard tugboat, because of fear of fouling the chain of a buoy at the junction of the Lesum and Weser Rivers, was

some proof that the vessel "smelt" the bank at Kilometer 17, about one-third of a mile up the river from the junction of the two rivers.

13. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that if the "Isis" [fol. 699] sheered, the power of the tugs and the power available on the vessel should have been sufficient to break it, and that, therefore, the ship was seaworthy.

14. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that there was no evidence that the "Isis" sheered prior to reaching Kilometer 17.

15. In that the Court failed to sustain libellant's exception to the Commissioner's ruling that the maneuver book offered in evidence by the respondent was some evidence that there was no tendency of the "Isis" to go to starboard prior to the disaster.

16. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that the "Isis" stranded as the result of

"negligent navigation in proceeding too fast and too close to the starboard bank of the channel at or about the time of passing the upbound vessel and that unseaworthiness, if any, in respect of the steering gear of the 'Isis' did not cause or contribute to the stranding."

17. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that there is abundant evidence on either side of the question as to whether or not the rudder became bent as a result of the first stranding and that "the origin of the injury is left to conjecture", although (1) there is no evidence supporting any suggestion [fol. 700], that there was any bend in the rudder prior to the first stranding; (2) the Commissioner found that the force of the blow in the first stranding was on the port side of the rudder; (3) immediately after the first stranding the ship sheered violently to starboard; (4) the bank which the Commissioner conjectured the vessel may have "smelt" was to starboard; (5) the after part of the vessel was afloat during all the time of the second stranding; (6) the rudder was subsequently found bent to starboard.

18. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that the testimony is insufficient to establish that any touching of bottom sufficient to bend the rudder would show "its effect on either the wire lashings or the quadrant or both", although the respondent's witness, the chief officer of the ship, who made fast the lashings and examined them and the quadrant, testified definitely that any touching of bottom would affect the lashings and the quadrant, and the only testimony to the contrary is that of opinion witnesses who never saw the ship or the conditions.

19. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that if the vessel was seaworthy for a voyage starting in the daytime, she was equally seaworthy for a voyage starting in the nighttime.

20. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that the respondent is relieved from liability in reference to any fault of the "Isis" in sailing, in the nighttime, because that action was taken on the advice and under the direction of a pilot.

[fol. 701] 21. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that he would give no weight to the record of the testimony given before the German Court of Inquiry known as Seeamt, formed to investigate this disaster, although that record shows that the master and other of the respondent's witnesses then testified inconsistently with their testimony in this case.

22. In that the Court failed to sustain the libellant's exception to the Commissioner's conclusions based in large part on his assumptions and speculations not supported by any evidence and frequently opposed to the testimony of the respondent's own fact witnesses who were familiar with the actual conditions.

23. In that the Court failed to sustain the libellant's exception to the Commissioner's finding that the diver sent down to examine the rudder while the vessel was at Bremen prior to the second stranding, found nothing wrong with the rudder, when the diver was not called as a witness and the only evidence on the matter is that he reported that he had found nothing wrong with it.

24. In that the Court found that the "Isis" was not guilty of an unjustifiable deviation although she sailed from Bremen in the night time with her rudder lashed and in tow of tugs, and that action was taken under the direct orders of one of the respondent's executive officers.

25. In that the Court failed to sustain the libellant's ex- [fol. 702] ception to the Commissioner's ruling that there must be a causal relation between unseaworthiness and the disaster to take from the respondent the right to the exemptions provided by Section 3 of the Harter Act; and to cause a breach of the condition of the bill of lading Jason clause.

26. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that, if the "Isis" was in all respects seaworthy at the respective ports of loading, even if she became unseaworthy at Bremen and sailed in that condition under the orders of the respondent's executive officers who had full knowledge of the conditions under which she was sailing, the error in sailing under those conditions relates "to navigation and management rather than to the discharge of the owner's duty of seaworthiness or the exercise of due diligence to make her seaworthy", and the respondent may still avail itself of the exemptions of Section 3 of the Harter Act; and that the conditions of the Jason clause have not been breached.

27. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that the clause in relation to general average appearing in the bills of lading issued at Punta Arenas, sets out a valid agreement that the cargo shall be liable to contribute in general average in relation to a casualty resulting from negligence in navigation.

28. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that all the general [fol. 703] average deposits sued for were demanded in accordance with the contracts of carriage and in accordance with law.

29. In that the Court failed to sustain the libellant's exception to the Commissioner's ruling that the libellant is not entitled to recover all the deposits required to be made by the respondent as a condition precedent to delivery of the cargo involved in the suits, with interest, and held that the libellant may only recover the excess of the deposits

over the amount found to be due from the respective cargo interests in the general average adjustments, with interest.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Office & P. O. address: No. 64 Wall Street, New York City.

[fol. 704] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, July 6, 1932.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Haight, Smith, Griffin & Deming, Proctors for Respondent.

[fol. 705] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 706] In the United States Circuit Court of Appeals for the Second Circuit, October Term, 1932

No. 97

Argued January 11, 1933. Decided February 14, 1933

Louis H. May, Libellant-Appellant,

v.

Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Libels were filed by Louis H. May, libellant, to recover moneys deposited by cargo owners with the respondent,

Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, as security for general average contributions. Decree for respondent; libellant appeals. Affirmed.

Bigham, Englar, Jones & Houston, of New York City (Henry N. Longley and F. Herbert Prem, both of New York City, of counsel), for appellant.

Haight, Smith, Griffin & Deming, of New York City (Charles S. Haight, John W. Griffin, and Wharton Poor, all of New York City, of counsel), for appellee.

OPINION

MANTON, Circuit Judge:

Alleging that it paid, under duress, sums of money as security for general average contribution, these libels are filed by appellant, as assignee for cargo owners. A special commissioner's report in favor of the appellee was confirmed by the court below.

The ship Isis, of 7,000 tons dead weight, equipped with twin screws and driven by engines of a total of 2,400 horse power, carried cargo for appellant's assignors for Bremen, Hamburg, and Antwerp. It is not questioned that when the vessel left her loading ports on the Pacific Coast she was seaworthy, properly manned and equipped. On her way to Bremen, Germany, the first port of discharge, she stranded in the Weser river, and, in clearing, her stern swung across the channel, striking the opposite bank; the blow doing damage to the port side of the rudder, resulting in a twist of 45° in the rudder stock. She resumed her way up the Weser, and developed a tendency to sheer to starboard. Tugs assisted her to Bremen. This stranding was due to negligence in navigation. While at Bremen, her rudder was examined by a diver, who found nothing wrong with it. She was then drawing 18′ 6″ of water forward and 23′ 3″ aft. When dry-docked, the water in the dock was lowered sufficiently to uncover all but 3 or 4 feet of her rudder. The marine superintendent of the appellee took charge, and, with others, inspected the ship. They found the twist in the rudder stock, but the rudder blade was found to be fair and straight as to that part which was above water, and the submerged portion appeared to be in

equally good condition. The examination was by hand, boat hook, and was assisted by electric searchlight. Repairs were not made to the rudder stock, and she was directed to proceed to Hamburg with the assistance of three tugs. The rudder was lashed by wires led to the quarter bitts and set up with tackles, and the quadrant was secured by one or more set screws. She proceeded at night down the stream against a flood tide. As the vessel proceeded, the Lesum river enters from the east or the starboard side, and the Weser bends sharply to the west or port, at a point between the points known as seventeenth and eighteenth kilometers. As the Isis approached, the flood tide cur- [fol. 707] rent was about 3 kilometers per hour setting up both rivers. A vessel bound up the river was sighted at this bend, and the Isis was navigated to starboard. She passed the other vessel near the seventeeth kilometer, but before she was entirely clear of this vessel she sheered to starboard, although the tugs used their utmost efforts to avoid it, and her engines used like efforts, and, while out of control, she was caught by the current on the port bow in such a way as to strand hard and fast amidships on a sand spit at the junction of the Weser and the Lesum rivers near Vegesack at about 3:50 a. m. To release the vessel, it was necessary to make sacrifices, and it is this, together with the expense incurred consisting of the assistance of tugs and the lighterage of the cargo, which forms the subject of the claims of general average. The ship was damaged and repairs were necessary. The entire cargo was discharged and delivered by transshipment to destination. Before delivery of the cargo to the consignees at destination, the appellee obtained deposits to secure payment of general average contribution from each cargo owner for the sacrifices and expenses due to both strandings.

The cargoes in question were shipped under a bill of lading which provided:

"General Average shall be payable in accordance with the York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the Port of New York. * * * If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly

manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the vessel, or from any patent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril. * * * The shipowner is entitled to require a deposit in any of these three currencies."

The Punta Arenas cargo was shipped under a form of bill of lading providing:

"General Average, if any, to be adjusted at the Company's option either at Bremen/Hamburg or at final Port of Destination; always according to York-Antwerp-Rules, and as to matters not therein provided for, according to the usages of the place where the adjustment is made up. * * * For this purpose the Owners are bound to declare, if required, the value of the goods and no goods will be delivered without security having been given by the Owners for the due payment of such General Average. Default, Error, Neglect in judgment or mistake of the Pilot, Master or the Crew in the navigation of the Ship, Defects of the Vessels or her Engines not noticed before and occasioned during the voyage shall not release the Owners from such contribution."

The latter bill of lading, it will be noted, does not have an express condition that due diligence must be used to make the vessel seaworthy, and this form is different from the usual Jason clause with which the first form is identical. The appellant contends that the shipowner cannot recover from the Punta Arenas cargo a general average contribution to sacrifices resulting from negligent navigation or un-

seaworthiness, because the absence of the due diligence provision has the effect of invalidating the entire general average clause. He refers to The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. Ed. 130, and The Jason, 225 U. S. 32, 32 S. Ct. 560, 56 L. Ed. 969. In The Irrawaddy Case, the validity of the general average clause was not questioned and the court decided that the Harter Act (46 U. S. C. A. §§ 190-195) alone did not entitle the owner to share in the general average rendered necessary by negligence in navigation. This was referred to in The Jason, 225 U. S. 32, 54, 32 S. Ct. 560, 56 L. Ed. 969; where an agreement provided that, if the owner had exercised due diligence to make his vessel seaworthy, he should be entitled to share in general average rendered necessary by negligence in navigation. It was held valid, and the owner was entitled to recover a contribution arising out of a negligent stranding. The court pointed out that, so far as the Harter Act relieved the shipowner of responsibility for the negligence of the master and crew, it is no longer against the policy of the law for [fol. 708] him to contract with the cargo owners for a participation in general average contribution growing out of such negligence. Thus the shipowner may contract exemption in so far as such is not in violation of the Harter Act. The prohibition of the Harter Act against the bill of lading clauses relieving from liability for negligence in the care and custody of cargo limits but does not invalidate general exemptions, and "the proper construction of such general language restricts it to cases where the carrier is not at fault for negligence or failure of due care." Cunard S. S. Co. v. Kelley (C. C. A.) 115 F. 678, 686; Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104, 123, 18 S. St. 12, 42 L. Ed. 398.

The Punta Arenas bill of lading must be construed as impliedly containing the restrictions of the Harter Act and as such be enforced. Therefore the effect of the general average provisions of both bills of lading is substantially the same, and it becomes unnecessary for us to consider separately whether the cargoes under these two forms are to be regarded as under bills of lading not containing the Jason clause above.

The bills of lading raised the questions of the effect of (a) negligent navigation; (b) management by the agents of the shipowner other than the master and crew of the vessel; (c)

due diligence; and (d) seaworthiness at the time of the commencement of the voyage and later at Bremen after the first stranding. The first form of bill of lading required the shipper to contribute to general average if damage was caused by fault or error in navigation or management and if the shipowner exercised due diligence to provide a seaworthy vessel. The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence. But the shipowner did intervene at Bremen through its marine superintendent, for it was he, rather than the master of the ship, who decided to send the ship out of Bremen under tow. The master was consulted, but the marine superintendent made the final decision. If sending the ship forward under tow was an error causing the damage, it would, in any case, be one of management or judgment covered by the exception in the bill of lading.

But the question of error of judgment or management is claimed to be important in determining whether or not the provision of seaworthiness of the vessel is applicable if we regard the start from Bremen to Hamburg as a new departure. It was not questioned but what the ship was seaworthy when it left its last loading port. When it broke ground, it satisfied all requirements of seaworthiness and due diligence under the terms of the bill of lading. The Elkton, 49 F. (2d) 700 (C. C. A. 2); The Steel Navigator, 23 F. (2d) 590 (C. C. A. 2). When a voyage is undertaken in stages, the strict requirement that a vessel be seaworthy when it breaks ground is fulfilled by equipping the vessel at each stage for the next leg of the voyage. The Steel Navigator, supra; The Oritani (D. C.) 40 F. (2d) 522. But permitting the owner to supply at stages of the voyage equipment known to be required at its inception does not mean that damages incurred during the voyage must be repaired by the owner at an intermediate port of call or that failure to do so violates the requirement of seaworthiness. Failure of the master or the agent of the owner to make such repairs is an error in management. The Milwaukee Bridge, 26 F. (2d) 327 (C. C. A. 2); United States v. N. Y. & O. S. S. Co., 216 F. 61 (C. C. A. 2); The Guadeloupe (D. C.) 92 F. 670.

Even if there were intervention of the owner at Bremen, through the marine superintendent, that did not require it to make the ship seaworthy for the next stage of the voyage to avoid the charge of unseaworthiness as stated in the

bill of lading. Was the ship seaworthy when it left for Hamburg? Seaworthiness, a relative term, depends upon the circumstances surrounding each undertaking. A vessel under tow may be regarded as seaworthy if the tugs are powerful enough to tow the vessel, even though she is not navigated under her own power. The appellant contends that the ship sheered to starboard and stranded (the second time) because her rudder blade was bent as a result of the first stranding. The bend in the rudder was found to be about 5°, and, assuming that this existed due to the first stranding and was not repaired at Bremen, still it would not account for the second stranding. The captain and mate of the vessel and the captain of the towboats testified that there was no difficulty experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, and, in so doing, they navigated through several bends in the channel in both directions. At the investigation and according to the report of the Seeamt (a German board of inquiry), statements were made by witnesses which would indicate that the bend in the rudder af- [fol. 709] fected the steering, but before the commissioner, where both parties had full opportunity to examine, it was established that it had no effect upon the navigation of the vessel. If there were a bend in the rudder, the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. As the vessel proceeded before the stranding, the three tugs were found below to have been going full speed ahead. But, as found below, the power of the vessel and her tugs was employed to correct any tendency to sheer, which would affect the navigation or control of the vessel. There was a sheer in the direction of the bank, and that was the probable consequence of the bend in the river and current, and, even with the assistance of the towboat, this was not overcome. It was expressly found that unseaworthiness, if any, with respect to the steering gear of the vessel, did not cause or contribute to this second stranding.

However, the question is presented as to whether or not the fact that the vessel was unable to proceed from Bremen under its own power and required the assistance of tugs justified classifying her as unseaworthy in continuing on this leg of her voyage. Those in charge of the vessel deter-

mined that it was not safe for her to proceed under her own power, and called to her assistance those towboats. The bills of lading, expressing the contract between the parties, consented to liability for general average only if the vessel were seaworthy. Of course, such a contract must impliedly contain the willingness of the cargo owner to consent to towing when necessary, such as in an instance when a vessel is docked or where navigation alone is insufficient or not safe. The cargo owners might reasonably have intended by their agreement to have accepted the transportation of their cargoes to Hamburg, assuming the risk of general average charges, if the vessel did so under its own power, but not if she became damaged so as to require the assistance of tugs. We have held that, while the Harter Act requires an owner to provide a ship that is in all respects seaworthy before he can take advantage of the exemption under the act, this requirement affects only causes of action for damages resulting from unseaworthiness. Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co. (C. C. A.) 47 F. (2d) 189, 192. There we said:

"It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness."

See The Malcomb Baxter, Jr., 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901; The Thessaloniki, 267 F. 67 (C. C. A. 2); Boston Marine Ins. Co. v. Met. Redwood Lumber Co., 197 F. 703 (C. C. A. 9); The Turret Crown (D. C.) 282 F. 354.

Concededly the vessel had her rudder stock twisted and the lower half of the rudder blade was deflected to starboard 5°. She had her rudder secured amidships and was in tow of three tugs, one on a hawser ahead and one tug lashed to either side. The tug ahead had 1,080 horse power, those on the sides about 800 each, and, while it is true that the bend in the rudder blade was not found below to have occurred at the time of the second stranding, this is based upon the claim that there was no evidence that the rudder struck anything on the port side. But be that as it may, it is not important, for the reason that competent navigators testified that a 5° bend would not affect the steering except to a slight extent. Thus we have a vessel proceeding on her voyage from Bremen crippled and assisted. The fault in

navigation which resulted in her stranding was the fault of the pilot, not of the master of the vessel. Under these circumstances, the vessel was not seaworthy. But within the terms of the bill of lading the cargo owners accepted this risk when they agreed that the cargo might be charged with general average in the event of negligent navigation of the ship. The courts have held that, where the vessel is concededly seaworthy when she sails on her voyage and becomes unseaworthy due to storm, and it is not sufficiently corrected by those in charge at an intermediate port, the owner is not deprived of the defenses under section 3 of the Harter Act (46 U. S. C. A. § 192). The Milwaukee Bridge, 26 F. (2d) 327 (C. C. A. 2); United States v. N. Y. & O. S. S. Co., 216 F. 61 (C. C. A. 2); The Guadeloupe (D. C.) 92 F. 670.

The appellant contends that the owner of the vessel intervened here by the action of the marine superintendent, who took charge of the vessel at Bremen and made the decision as to sailing from that port without repairs. The argument is that the entire voyage must be regarded as in stages, and that the vessel must be seaworthy at the beginning of each stage, citing The Valentine (D. C.) 131 F. 352; The Will [fol. 710] domino, 300 F. 5 (C. C. A. 3). In the Valentine Case, the fault resulting in the loss while operating at destination was not initiated there, but at the inception of the voyage, and the owner was held liable because the default of the crew of the lighter related back to the nondelegable duty of the owner at the beginning of the voyage. In The Willdomino Case, the fault arose at the inception of the voyage.

The Isis was fitted for the voyage, and it was not intended that she would proceed in stages, and, when she sailed from Bremen, the owner's warranty of seaworthiness was thereupon performed and discharged. While we have accepted the stages of voyage doctrine, we have held that, if a vessel is seaworthy on sailing on her intended voyage, all repairs or adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness. The Steel Navigator, 23 F. (2d) 590 (C. C. A. 2); The Newport, 7 F. (2d) 452 (C. C. A. 2); The President Polk (D. C.) 40 F. (2d) 665; The Oritani (D. C.) 40 F. (2d) 522. The unseaworthiness of the vessel when she left Bremen would therefore not affect the contractual

obligations of the bill of lading. The appellee had performed its obligation and duty under the Harter Act, and it was entitled to the protection of the Jason clause. We hold that the general average clauses in the bills of lading were effective and binding at the time of the second stranding, and that the general average was properly charged against the cargoes, and the deposits made as security in order to release the cargoes may not now be recovered.

Decree affirmed.

[fol. 711] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

LOUIS H. MAY, Libellant-Appellant,

vs.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT, Respondent-Appellant

DECREE—Filed Feb. 21, 1933

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 712] [File endorsement omitted.]

[fol. 713] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION—Filed March 13, 1933

Subject to the Permission of the Court

It is hereby stipulated and agreed, by and between the proctors for the respective parties hereto, that the Notice

and Order allowing appeal in behalf of the Indemnity Insurance Company of North America and Royal Indemnity Company, dated, May 16, 1932, and filed in the office of the Clerk of the United States District Court for the Southern District of New York on the same date, which said notice and order were omitted from the record on appeal in this consolidated action, may be included in the said record on appeal.

Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellant. Haight, Smith, Griffin & Deming, Proctors for Respondent-Appellee.

It is so ordered.

Manton, U. S. C. J.

March 10, 1933.

[fol. 714] In United States District Court

Nos. 102-296, 102-128, 102-155, 103-353, 105-360. Consolidated by Order of January 13, 1931

[Title omitted]

Notice and Order Allowing Appeal

Sirs: Please take notice that the Indemnity Insurance Company of North America and Royal Indemnity Company, stipulators for libellants's costs in these suits, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree herein entered in the office of the Clerk of this Court on February 16, 1932, and from each and every part of said decree, and that the said Indemnity Insurance Company of North America and Royal Indemnity Company also adopts as their assignment of errors the assignment of errors heretofore filed herein on behalf of libellant.

Dated New York, May 13, 1932.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant. Office & P. O. Address: 64 Wall Street, New York City.

[fol. 715] To Charles Weiser, Esq., Clerk; Haight, Smith, Griffin & Deming, Esqs., Proctors for Respondent, 27 William Street, New York City.

Allowance of Appeal

The foregoing appeal is hereby allowed. Dated, New York, May 16th, 1932.

Francis G. Caffey, U. S. D. J.

[fol. 716] [File endorsement omitted.]

[fol. 717] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 718] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,680 U. S. Circuit Court of Appeals, Second Circuit. Term No. 80. Louis H. May, Indemnity Insurance Company of North America, and Royal Indemnity Company, petitioners, vs. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft. Petition for a writ of certioari and exhibit thereto. Filed May 19, 1933. File No. 80, O. T., 1933.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Statement	1
The Nature of the Case	2
The Questions Presented	6
1. Where a shipowner fails to use due diligence to make his vessel seaworthy, and she is in fact unseaworthy at the time of sailing, can he nevertheless obtain exemption under Section 3 of the Harter Act, in respect of damage to cargo resulting from negligent navigation, provided he can satisfy the court that the unseaworthiness did not contribute to the damage?	6
2. Where a shipowner intervenes and personally orders a vessel to sail from an intermediate port knowing her to be unseaworthy, can he obtain exemption under the third section of the Harter Act by virtue of his previous compliance with that Act at the original port of shipment?	10
Reasons for Allowance of Writ	12
Brief in Support of Petition for Writ of Certiorari	15
Jurisdiction	15
Statement	15
Specifications of Error	17
Point I. The ruling of the Circuit Court of Appeals that the owner of a ship which sails in an unseaworthy condition, through his failure to use due diligence to make her seaworthy, may nevertheless have the exemption granted in the third section of the Harter Act as to any damage not resulting from the unseaworthiness, is contrary to the lan-	

PAGE

gunge of the statute; is in conflict with a number of its own previous decisions; is squarely in conflict with the law as settled in the Third Circuit; and is contrary to the rule as several times stated by this Court 18

(1) The decision of the Circuit Court of Appeals in this case is contrary to the express terms of the Harter Act 18

(2) The decision of the Circuit Court of Appeals in this case is contrary to a number of its own previous decisions and dicta 22

(3) The decision of the Circuit Court of Appeals in this case is directly contrary to the settled law of the Third Circuit 29

(4) The decision of the Circuit Court of Appeals in the present case is contrary to the rule as several times stated by this Court 30

POINT II. Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act 31

Conclusion 38

TABLE OF CASES CITED.

PAGE

Boston Marine Insurance Company v. *Met. Redwood Lumber Co.*, 197 F. 703 (C. C. A. 9) 21, 22

Carib Prince, The, 170 U. S. 655 at pp. 661 2 20

Comp. Gen. de Tabacos de Filipinas v. *U. S.*, 49 Fed. (2d) 700, 702 ..... 8, 10, 26, 29

Fort Morgan, The, 284 Fed. 1, 4 (C. C. A. 4 Cir.) 19

Germania, The, 124 Fed. 1, 5 (C. C. A. 2 Cir.) 19

Guadeloupe, The, 92 Fed. Rep. 670 32

Hartford & New York Transportation Company v. *Rogers & Hubbard Co.*, 47 Fed. (2d) 189, 192, 7, 10, 28, 30

International Navigation Co. v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218 at p. 226 ..... 8, 30

Irrawaddy, The, 171 U. S. 187 ..... 16, 19

Jason, The, 225 U. S. 32 ..... 16, 19

Jeanie, The, 230 Fed. 463, 471 (C. C. A. 9 Cir.) 19

Louis Dreyfus v. *Patterson Steamships, Ltd.*, 43 Fed. (2d) 824, 826 (C. C. A. 2) 16, 27

Maggie Hammond, The, 9 Wall. 435 at p. 444 19

Malcolm Baxter, Jr., The, 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901 at p. 331 ..... 21, 22

Newport, The, 7 Fed. (2d) 452, 454 (C. C. A. 9 Cir.) .. 19

In re O'Donnell et al., 26 Fed. (2d) 334, 336 (C. C. A. 2) 10, 25, 29

The R. Lenahan, Jr.-John J. Ryan Carlotta, 48 Fed. (2d) 110, 112 (C. C. A. 2) 9, 29

River Meander, The, 209 Fed. 934, 937 (S. D. N. Y.) .. 9, 22

Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 329 ... 19, 25, 29

Southwark, The, 191 U. S. 1 at p. 16 31

St. Paul, The, 277 Fed. 99, 107 (S. D. N. Y.) 9, 24

PAGE

Thessalonikl, The, 247 Fed. 67, 76 (C. C. A. 2) (reversed on appeal on other grounds) 10, 21, 23

Turret Crown, The, 282 Fed. 354, 360 (S. D. N. Y.) (reversed on other grounds 297 Fed. 766) ... 9, 21, 24, 25

Valentine, The, 131 Fed. 352 (E. D. N. Y.) 35, 36

Westhaven, The, 36 Fed. (2d) 706, 709 (C. C. A. 2), ... 10, 11, 26, 27, 31, 35, 36, 39

Wilderoft, The, 201 U. S. 378 30

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Article 3, Section 2 of the Constitution of the United States 15

Section 240 of the Judicial Code as amended by Act of February 13, 1925, 43 Stat. 938 (28 U. S. C., Sec. 347) 15

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Section 8 of the Canadian Water Carriage of Goods Act . 27, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG AMERIKANISCHE PACKETFAHRT AKTIEN GESELLSCHAFT,

Respondent.

The Petition of Louis H. May, Indemnity Insurance Company of North America and Royal Indemnity Company for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

Your petitioner, Louis H. May, is the assignee of the owners of certain merchandise which was laden on the German Motorship "Isis", in December, 1927, at various ports on the Pacific Coast of Canada, the United States and Central America, consigned to Hamburg. Your petitioners, Indemnity Insurance Company of North America and Royal Indemnity Company, are the stipulators for libellant's costs against whom a decree for costs was en-

tered in the District Court. Your petitioner, Louis H. May (hereinafter referred to as "the petitioner"), filed five separate libels against the respondent (which were later consolidated under the above title) in the United States District Court for the Southern District of New York. The case was referred to a commissioner and thereafter, on his report, a decree was entered dismissing the libels. Thereafter, your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals is reported in 63 Fed. (2d) at page 248, and appears in the Record at page 700. The opinion of the United States District Court for the Southern District of New York is reported in 57 Fed. (2d) at page 265, and appears in the Record at page 685.

The Nature of the Case.

The "Isis" was a general ship engaged in the common carriage of merchandise by sea. At the time of sailing from her various loading ports on the Pacific Coast she was seaworthy. While proceeding up the Weser River, on her way to Bremen, Germany, she stranded, owing to negligence in navigation, and sustained certain damage, including a 45° twist in her rudder stock. With the assistance of tugs she proceeded to Bremen, where she was put in drydock. The dock was not entirely pumped out, however, and at the time the vessel was examined (which was at night) the lower part of her rudder was under water. The head office of the respondent at Hamburg dispatched respondent's marine superintendent to Bremen, and he decided, after consultation with the head office of the respondent, that the vessel should proceed to Hamburg without being repaired, with her rudder lashed amidships and with the assistance of three tugs. Under his direction she set

out on the voyage at night, without obtaining any certificate of seaworthiness. After proceeding for some six miles, she took a sheer to starboard which the tugs were unable to control, and again stranded, sustaining damage which made it necessary for her to discharge and transship her cargo, in order to make necessary repairs. When the cargo arrived at destination respondent exacted from the consignees cash deposits to secure the payment of general average contribution to the sacrifices and expenses incurred in connection with both strandings.

Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding.

Your petitioner contended that the respondent was not entitled to any contribution from cargo in respect of the second stranding, and this proceeding was brought to recover the amount of the deposits exacted to secure the contributions claimed in respect of that stranding. Your petitioner contended that the "Isis", when she left Bremen, was unseaworthy to navigate the narrow and tortuous channel of the Weser River, particularly at night; that her rudder (as well as the rudder stock) was bent, so that even with the rudder lashed amidships her course would be erratic, and she could not make such a voyage safely while being steered by tugs.

The Circuit Court of Appeals held:

(1) That the "Isis" was unseaworthy when she left Bremen.

(2) That the decision to sail the vessel in her crippled condition was made by the owner, through its marine superintendent, and not by the master.

(3) That the unseaworthiness of the vessel did not contribute to the second stranding, which was due to negligent navigation.

(4) That a loss of due diligence and unseaworthiness not contributing to a subsequent loss does not deprive a shipowner of the exemption granted in Section 3 of the Harter Act (Act of February 13th, 1893; U. S. C., Title 46, Sec. 192).

(5) That the respondent was, therefore, entitled to exemption under Section 3 of the Harter Act, and entitled to recover general average under the terms of the "Jason Clause" in the bills of lading, notwithstanding its personal intervention at the intermediate port of Bremen, and its personal responsibility for the condition in which the "Isis" left that port.

We quote as follows from the opinion of the Circuit Court of Appeals:

> "The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence. But the shipowner did intervene at Bremen through its marine superintendent for it was he, rather than the master of the ship, who decided to send the ship out of Bremen under tow. The master was consulted but the marine superintendent made the final decision. If sending the ship forward under tow was an error causing the damage, it would, in any case, be one of management or judgment covered by the exception in the bill of lading" (Record, p. 710).
>
> * * * * * * *
>
> "It was not questioned but what the ship was seaworthy when it left its last loading port. When it broke ground it satisfied all requirements of seaworthiness and due diligence under the terms of the bill of lading" (Record, p. 710).
>
> * * * * * * *
>
> "We have held that while the Harter Act requires an owner to provide a ship that is in all re-

sports seaworthy before he can take advantage of the exemption under the act, this requirement affects only causes of action for damages resulting from unseaworthiness. *Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co.* (C. C. A.), 47 Fed. (2) 180, 182. There we said:

> "It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness" (Record, p. 712).

* * * * * * *

"Immediately the vessel had her rudder stock twisted and the lower half of the rudder blade was deflected to starboard 5°. She had her rudder secured amidships and was in tow of three tugs, one on a hawser ahead and one tug lashed to either side. The tug ahead had 1050 h. p., those on the sides about 800 each, and while it is true that the bend in the rudder blade was not found below to have occurred at the time of the second stranding, this is based upon the claim that there was no evidence that the rudder struck anything on the port side. But be that as it may, it is not important for the reason that competent navigators testified that a 5° bend would not affect the steering except to a slight extent. Thus we have a vessel proceeding on her voyage from Bremen crippled and assisted. The fault in navigation which resulted in her stranding was the fault of the pilot; not of the master of the vessel. Under these circumstances, the vessel was not seaworthy" (Record, p. 713).

* * * * * * *

"The 'Isis' was fitted for the voyage and it was not intended that she would proceed in stages and when she sailed from Bremen, the owner's warranty of seaworthiness was thereupon performed and discharged. While we have accepted the stages of voy-

age doctrine, we have held that if a vessel is seaworthy on sailing on her intended voyage, all repairs or adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness. *The Steel Navigator*, 23 Fed. (2) 590 (C. C. A. 2); *The Newport*, 7 Fed. (2) 452 (C. C. A. 9); *The Pres. Polk* (D. C.), 40 Fed. (2) 65; *The Britani* (D. C.), 40 Fed. (2) 522. The unseaworthiness of the vessel when she left Bremen would therefore not affect the contractual obligations of the bill of lading. The appellee had performed its obligation and duty under the Harter Act and it was entitled to the protection of the Jason Clause" (Record, p. 714).

The Questions Presented.

4. *Where a shipowner fails to use due diligence to make his vessel seaworthy, and she is in fact unseaworthy at the time of sailing, can he nevertheless obtain exemption under Section 3 of the Harter Act, in respect of damage to cargo resulting from negligent navigation, provided he can satisfy the court that the unseaworthiness did not contribute to the damage?*

Section 3 of the Harter Act is conditional in form, and provides that

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy * * *"

the owner shall not be liable for damage resulting from faults or errors in the navigation or management of the vessel. In the case of *The Willdomino*, 300 Fed. Rep. 5, the Circuit Court of Appeals for the Third Circuit specifi-

cally decided that where a vessel owner furnishes an unseaworthy ship, through lack of due diligence—

> "he is liable for damage to the cargo resulting from negligence of the master and crew in the navigation or management of the vessel, and the carrier is so liable wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel" (p. 11).

This Court issued a writ of *certiorari* in that case, and the point above mentioned was briefed and argued in this Court. The case was affirmed on another ground, however, and this Court found it unnecessary to decide the precise point now under discussion (272 U. S. 718, 728).

The law in the Third Circuit, therefore, is definitely settled, that the condition stated in the 3rd section of the Harter Act is absolute; and that non-compliance with this condition deprives the owner of any protection under the section, without regard to any question of causal relation.

In the present case the Circuit Court of Appeals has definitely adopted the opposite view. In its opinion in the present case the Circuit Court of Appeals cites its opinion in the earlier case of *Hartford & New York Transportation Company* v. *Rogers & Hubbard Co.*, 47 Fed. (2) 189. In that case, at page 192, after reviewing the earlier authorities, the Circuit Court of Appeals for the Second Circuit said:

> "In view of the foregoing, the language of Judge Morris in *The Willdomino* (C. C. A.), 300 F. 5, at page 11, to the effect that a carrier is liable 'wholly without regard to whether or not there was any causal connection between the lack of due diligence

to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel' cannot be regarded as in accord with the authorities."

While this Court has never had occasion to decide the precise point presented here, it has several times expressed itself *obiter* in accordance with the rule in the Third Circuit. The most definite of these expressions appears in the opinion of this Court in the case of *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, at page 226, where this Court said:

> "We repeat that *even if the loss occur through fault or error in management*, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing." (Italics ours.)

The decision of the Circuit Court of Appeals for the Second Circuit in the present case is contrary to a number of its own previous decisions. We think it is no exaggeration to say that the decisions in that court, on the point here presented, are so conflicting that an authoritative decision by this Court is urgently required in the interest of justice.

The Circuit Court of Appeals for the Second Circuit has itself recognized the conflict in its various opinions on this point. Thus is *Comp. Gen. de Tabacos de Filipinas* v. *U. S.*, 49 Fed. (2) 700, Judge Learned Hand, delivering the opinion of that court, said (at pp. 701-2):

> "The facts do not raise a question argued at the bar; whether a ship's unseaworthiness in a respect

which has nothing to do with the loss, will deprive the owner of recourse to the section. The finality of our dictum to the contrary in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 192, we need not therefore consider, except to observe that it is contrary to *In re O'Donnell* (C. C. A.), 26 F. (2d) 334; id., 34 F. (2d) 925 (C. C. A. 2), and to a dictum in *The Waalhaven*, 36 F. (2d) 706 (C. C. A. 2). Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion. Here at any rate the unseaworthiness directly caused the loss, and that disposes of the case."

It may be that, in the present case, the court has finally committed itself; but an examination of the decisions in this Circuit suggests that decisions in future cases may depend on how the bench is constituted.

In our brief submitted herewith we shall discuss the various opinions and decisions in the Second Circuit on the question whether there must be a causal relation between lack of due diligence and subsequent damage in order to deprive a shipowner of the exemption granted in the third section of the Harter Act. In this petition we shall merely tabulate them chronologically as follows:

DECISIONS.

1913 Decision by Judge Holt in the Southern District of New York that there need be no causal relation (*The River Meander*, 209 Fed. 931, 937).

1921 Decision by Judge Mayer in the Southern District of New York that there need be no causal relation (*The St. Paul*, 277 Fed. 99, 107).

1922 Decision by Judge Ward in the Southern District of New York that there must be a causal relation (*The Turret Crown*, 282 Fed. 354, 360); reversed by C. C. A. without discussion of this doctrine.

1929 Decision by the Circuit Court of Appeals that there need be no causal relation (*In re O'Donnell*, 28 Fed. (2d) 833, 836).

1931 Decision by Circuit Court of Appeals that there need be no causal relation (*The K. Leonhart, Jr. John J. Ryan Corbette*, 48 Fed. (2d) 110, 112).

1933 Decision by Circuit Court of Appeals in present case, that there must be a causal relation.

OTHER DICTA.

1920 Opinion by Circuit Court of Appeals indicating that there must be a causal relation (*The Thessaloniki*, 267 Fed. 67, 70).

1929 Opinion by Circuit Court of Appeals indicating that there need be no causal relation (*The Manhattan*, 30 Fed. (2d) 709, 709).

1930 Opinion by Circuit Court of Appeals indicating that there need be no causal relation (*Louis Dreyfus* v. *Patterson Steamships, Ltd.*, 43 Fed. (2d) 824, 826).

1931 Opinion by Circuit Court of Appeals (cited as authority in present case) indicating that there must be a causal relation (*Hartford & N. Y. Transp. Co.* v. *Rogers & Hubbard Co.*, 47 Fed. (2d) 180, 182).

1931 Opinion by Circuit Court of Appeals indicating that the point was still open (*Comp. Gen. de Tabacos de Filipinas* v. *U. S.*, 49 Fed. (2d) 700, 702).

2. *Where a shipowner intervenes and personally orders a vessel to sail from an intermediate port knowing her to be unseaworthy, can he obtain exemption under the third section of the Harter Act by virtue of his previous compliance with that Act at the original port of shipment?*

The Circuit Court of Appeals held in this case that a lack of due diligence in preparing the vessel to sail from an intermediate port, even though this lack of diligence was on

the part of the owner itself, which intervened and took charge of the situation at Brenen, did not deprive the owner of the exemption provided by the Third Section of the Harter Act.

This decision is squarely contrary to the decision of the Circuit Court of Appeals for the Third Circuit in the case of *The Willdomino* (supra). In that case the owner intervened at an intermediate port (Gibraltar) and prevented the master from taking on an adequate supply of fuel. The Circuit Court of Appeals held that this was a fault chargeable to the owner personally. This Court, while not expressly deciding the point, apparently took the same view, as it referred to the "willful failure to take on sufficient coal" (272 U. S. 718, at p. 727). In its opinion in the present case the Circuit Court of Appeals for the Second Circuit says (Record, p. 714):

> "In the *Willdomino* case, the fault arose at the inception of the voyage."

This statement is clearly erroneous, as appears from an examination of the opinions of the Circuit Court of Appeals and of this Court. In that case cargo was taken on board at Messina, and the negligence in failing to take on a sufficient supply of fuel, occurred at the ports of Gibraltar and Lisbon. In that case, as in the present, the owner intervened and gave the instructions which rendered the vessel unseaworthy on sailing from an intermediate port. In that case, as in the present, the damage resulted not from the unseaworthiness, but from subsequent negligence in navigation.

The decision in the present case is contrary also to the rule as stated by the Circuit Court of Appeals for the Second Circuit in the case of *The Waatharen*, 36 Fed. (2nd) 706.

Reasons for Allowance of Writ.

1—The decisions in the Second Circuit on the two questions presented in the present case are hopelessly conflicting. The questions are of great commercial importance, and it is certainly desirable that the law on this subject should be definitely settled in this Circuit (in which the volume of maritime litigation is greater than in any other Circuit.

2—The law as laid down in the present case is directly contrary to the law as settled in the Third Circuit. Geographically, the port of New York is partly in the Second Circuit and partly in the Third Circuit. It is, we submit, intolerable that a different rule of law should be applied in two circuit courts of appeals, each of which has jurisdiction over a part of the waters of the same port.

3—The decision in the present case is contrary both to the letter and the spirit of the Third Section of the Harter Act. It nullifies the condition expressly stated at the beginning of that Section and places upon the owner of cargo the burden of litigating a question which is wholly irrelevant, namely, whether the shipowner's failure to comply with the condition has contributed to the subsequent loss or damage. In the present case your petitioner, Louis H. May, was forced to litigate this issue and was defeated, although his contention was certainly logical enough on its face, i. e., that the uncontrollable sheer of the "Isis", which caused the second stranding in the Weser River, was not unconnected with the fact that she had undertaken to navigate a narrow and winding channel at night with her steering gear disabled. Petitioner, of course, had no witnesses to any of the facts, and had to rely on the testimony of experts based on the fact evidence submitted by the respondent. This is precisely the situation which Congress foresaw and guarded against in phrasing the Third Section of the Harter Act. By that Section the shipowner receives

an exemption which is in derogation of the cargo owners' common law rights; but this exemption is expressly made conditional on the performance of certain duties. If the condition is not performed, the shipowner is in practically the same position as if the Harter Act had never been passed. The Third Section of the Harter Act is, in effect, an offer of immunity; and, like an offer, it must be accepted according to its terms. One who makes an offer is not bound by an acceptance which includes added or different conditions, even though the person who tenders the acceptance is prepared to prove that the new conditions are equally advantageous.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket, "Consolidated Action 10206, Louis H. May, Libellant Appellant, v. Hamburg Amerikanische Packetfahrt Aktien Gesellschaft, Respondent Appellee"; and that the said decree of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

LOUIS H. MAY,
INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,
ROYAL INDEMNITY COMPANY,
Petitioners.

By D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article 3, Section 2 of the Constitution of the United States of America, and under Section 240 of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938 (U. S. C., Title 28, Sec. 347).

Statement.

The facts are sufficiently stated in the petition, and will not be repeated here.

Both of the courts below dealt with this case on the correct assumption that the petitioner's right to recover

the general average deposits exacted by the respondent, was dependent upon the same principles which would govern his right to recover damage to the cargo. In this case there was no damage to the cargo; but the requirement of the general average deposits was a clear breach of the contract of affreightment unless justified by facts which entitled the respondent to claim contribution.

Apart from the Harter Act, it is, of course, well settled that a shipowner cannot claim from cargo any contribution to sacrifices or expenses rendered necessary by negligence in navigation. *The Irrawaddy*, 171 U. S. 187; *The Jason*, 225 U. S. 32. Accordingly, the present case presents precisely the same issue which would be presented in a suit for damage to cargo, *i. e.*, whether or not the shipowner is entitled to the exemption granted by the third section of the Harter Act. If the respondent shipowner is entitled to this exemption, the present suit must fail; for the bills of lading incorporate a clause in substantially the form approved by this Court in the case of *The Jason* (*supra*), providing that if the shipowner has used due diligence to make the ship seaworthy, the cargo shall contribute in general average even where the sacrifice or expense is rendered necessary by negligent navigation. If, on the other hand, the respondent is not entitled to exemption under the Harter Act, it clearly had no right to contribution in respect of the second stranding, and the petitioner is entitled to recover.

The Circuit Court of Appeals did not discuss the question of due diligence as such, since its decision rendered that question immaterial. The court found, however, that the owner intervened and took charge of the situation at Bremen; and the evidence is clear that the respondent's marine superintendent and nautical director was fully aware of the conditions which the Circuit Court of Appeals found rendered the "Isis" unseaworthy when she sailed

from Bremen. Accordingly, the decision below can be sustained only on the theory that lack of due diligence and unseaworthiness are immaterial, under the third section of the Harter Act, unless they contribute to a subsequent loss.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that lack of due diligence and resulting unseaworthiness do not deprive a shipowner of the exemption granted in the third section of the Harter Act (Act of February 13, 1893; U. S. C., Title 46, Sec. 192) unless such unseaworthiness contributes to the damage in respect of which the exemption is sought.

2. In holding that a shipowner who personally intervenes and causes his ship to sail from an intermediate port in an unseaworthy condition, through lack of due diligence, is still entitled to exemption under the third section of the Harter Act provided he complied with that section at the original port of loading.

POINT I.

The ruling of the Circuit Court of Appeals that the owner of a ship which sails in an unseaworthy condition, through his failure to use due diligence to make her seaworthy, may nevertheless have the exemption granted in the third section of the Harter Act as to any damage not resulting from the unseaworthiness, is contrary to the language of the statute; is in conflict with a number of its own previous decisions; is squarely in conflict with the law as settled in the Third Circuit; and is contrary to the rule as several times stated by this Court.

(1) *The decision of the Circuit Court of Appeals in this case is contrary to the express terms of the Harter Act.*

The present case turns upon the proper construction of the third section of the Harter Act, which is as follows:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving

or attempting to save life or property at sea, or from any deviation in rendering such service."

It has frequently been held that the Harter Act, being in derogation of common law rights, should be strictly construed.

The Irrawaddy, 171 U. S. 187, 195;
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 329;
The Germanic, 124 Fed. 1, 5. (C. C. A. 2 Circ.);
The Jeanie, 236 Fed. 463, 471 (C. C. A. 9 Circ.);
The Fort Morgan, 284 Fed. 1, 4 (C. C. A. 4 Circ.);
The Newport, 7 Fed. (2d) 452, 454 (C. C. A. 9 Circ.).

In construing the above section it is important to bear in mind that the Harter Act does not impose any liability. The first two sections of the Act are merely declaratory of the law as it stood before they were passed. They forbid carriers to insert in their bills of lading clauses relieving them of liability for their own negligence or the negligence of their servants. Such clauses were, of course, void at common law. *The Jason, supra.* The third section of the Act gives the carrier a conditional exemption from liability for losses due to certain specified causes. If a shipowner complies with the conditions laid down in this section, the section gives him certain protection which he already had at common law (*e. g.*, in respect of acts of God and public enemies—*cf. The Maggie Hammond*, 9 Wall. 435, at p. 444); it also gives him, *proprio vigore*, certain protection (*e. g.*, in respect of sea perils) which he could otherwise obtain by contract; and also gives him certain protection (*i. e.*, in respect of the negligence of his servants) which he could not legally obtain in any other way than by compliance with this section. A shipowner who does not comply with the condition is in exactly the same position as before the Act was passed. He can exempt himself, by the terms

of his bill of lading from liability for damage due to perils of the sea, latent defects and similar causes, but he cannot exempt himself from liability for damage due to negligence.

The argument is frequently made, on behalf of the shipowner, that Congress could not have intended to impose liability on a shipowner for something which did not cause any damage. The fallacy of this argument is readily apparent. The shipowner is not held liable because he failed to use due diligence, but because his servants have been guilty of negligent navigation. The owner's lack of due diligence merely precludes him from obtaining a statutory exemption and leaves him subject to his ordinary common law liability.

The very structure of the third section of the Harter Act clearly indicates that there is no causal connection contemplated between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. In *The Carib Prince*, 170 U. S. 655, at pages 661-2, this Court held that the Harter Act does not protect the shipowner in respect of damage due to unseaworthiness, even though he has used due diligence to make his vessel seaworthy.

In holding that the respondent was entitled to exemption under the third section of the Harter Act, the Circuit Court of Appeals said (Record, p. 712):

> "We have held that, while the Harter Act requires an owner to provide a ship that is in all respects seaworthy before he can take advantage of

the exemptions under the Act, this requirement affects only causes of action for damages resulting from unseaworthiness. *Hartford & N. Y. Transp. Co.* v. *Rogers & Hubbard Co.* (C. C. A.), 47 F. (2d) 189, 192. There we said:

> 'It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness.'

See *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *The Thessaloniki*, 267 F. 67 (C. C. A. 2); *Boston Marine Ins. Co.* v. *Met. Redwood Lumber Co.*, 197 F. 703 (C. C. A. 9); *The Turret Crown* (D. C.), 282 F. 354."

The case of *The Malcolm Baxter, Jr.*, cited in the above quotation, lends no support whatever to the proposition for which it is cited. In that case this Court held that the owners' failure to exercise due diligence to make the vessel seaworthy deprived them of any right to exemption under the Harter Act (277 U. S. 323, at p. 331). Apparently the case was cited because of the following statement in the opinion of this Court (at p. 331):

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

This statement, however, clearly has no bearing on the present case. It was made in connection with a bill of lading clause exempting the vessel from liability for "restraints of princes, rulers and peoples". This clause, of course, was perfectly valid at common law, and the shipowners, in claiming the benefit of it, did not require any aid from the Harter Act. If it had been necessary for the shipowners to rely on the Harter Act, they would

have failed; for this Court expressly held that they were not entitled to exoneration under that Act. Based on a careful reading of the opinion, and on our knowledge of the case, in which we were of counsel, we feel justified in stating that the decision of this Court in the *Malcolm Baxter, Jr.,* does not lend the slightest support to the decision in the present case; and so far as it has any bearing on the present case it tends to support the position of your petitioner.

The case of *Boston Marine Insurance Company* v. *Met. Redwood Lumber Co.,* which is also cited by the Circuit Court of Appeals in support of its decision, did not deal with the Harter Act at all, but only involved the Act of March 3rd, 1851, granting shipowners a limitation of liability (R. S. 4283; U. S. C., Title 46, Sec. 183). We respectfully submit that decisions dealing with the Act of 1851 have no possible bearing on the question which arises here under the third section of the Harter Act. It is, of course, well settled that the "privity or knowledge" which will prevent an owner from obtaining limitation under the Act of 1851, is privity or knowledge of something which results in loss or damage. This results necessarily from the express language of the Act of 1851, which grants to a shipowner a limitation of his liability for any "loss, damage * * * or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner * * *."

The other cases cited by the Circuit Court of Appeals in the passage above quoted from its opinion, are all cases decided in the Second Circuit. We shall mention these in discussing the present state of the law in that Circuit.

(2). *The decision of the Circuit Court of Appeals in this case is contrary to a number of its own previous decisions and dicta.*

In support of the above statement we will submit a brief chronological analysis of the cases in which the question now under discussion has been considered either by District Courts in the Second Circuit or by the Circuit Court of Appeals for the Second Circuit.

As far as we can ascertain, the first decision on the point now under discussion was rendered in the case of *The River Meander,* 209 Fed. 931 (S. D. N. Y.; Opinion by Judge Holt, December 23, 1913). There Judge Holt held, as a necessary part of his decision (at p. 937):

> "Moreover, on the voyage to New York the serious and substantially constant leak in the No. 1 port hold, which began shortly after leaving Gibraltar, shows, in my opinion, that the ship was not seaworthy during the voyage. It is said that that leak had nothing to do with the damage to the cargo, which I think is true; but the requirement of the Harter Act is that the owner must provide a ship that is in all respects seaworthy before he can take advantage of the exemptions from liability required by that act."

In *The Thessaloniki,* 267 Fed. 67 (C. C. A. 2nd Circ., Circuit Judges Ward, Rogers and Hough; Opinion by Judge Ward, August 11, 1920), it was claimed on behalf of cargo that the ship was unseaworthy in respect of her boilers and engines. There was also some suggestion that the abandonment of the vessel was premature and that if her crew had remained on board, she might have been saved. The Court said:

> "We think it quite incredible that a valuable steamer and cargo would have been abandoned within 300 miles of New York, if they were not past saving. However, had this been the case, it would have been an error in the navigation and management of the

> vessel, for which the owners would not be liable under the Harter Act (Comp. St. §§8029-8035); if they had exercised due diligence to make her seaworthy.
>
> The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines, and sounding pipes. We may assume them all to be established, and the only result would be delay in the prosecution of the voyage" (p. 70).

It is not entirely clear from the opinion whether the passage above quoted constitutes a necessary part of the decision or whether it should be classed as *obiter dictum.*

In *The St. Paul,* 277 Fed. 99 (S. D. N. Y., Opinion by Judge Mayer, January 10, 1921), the vessel was seized under legal process. The carrier sought exemption, under Section 3 of the Harter Act, from liability for damage to cargo resulting from fire during the delay while the vessel remained in custody. Judge Mayer held (at p. 107), that the carriers' failure to exercise due diligence to make the vessel seaworthy precluded him from claiming exoneration under the Harter Act, apparently without regard to any causal connection between the unseaworthiness and the damage to cargo.

In *The Turret Crown,* 282 Fed. 354 (S. D. N. Y.; Opinion by Circuit Judge Ward, May 12, 1922), the District Court found that the vessel was unseaworthy when she sailed on her voyage, but that the unseaworthiness had no causal connection with the damage to cargo sued for. Upon these facts, Judge Ward held (p. 360):

> "If forcing the steamer into the sea, whether a head sea or following sea, at a speed sufficient to give steerage way did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act (Comp. St. §§8029-8035)."

Accordingly, the libel was dismissed in the District Court. The Circuit Court of Appeals reversed this decision on the ground that the damage to cargo resulted directly from the unseaworthiness of the vessel. Accordingly, the question now under discussion was not considered or decided in that court (297 Fed. Rep. 766).

In re O'Donnell et al., 26 Fed. (2d) 334 (C. C. A. 2nd Circ.; Circuit Judges Manton, Learned Hand, and Swan; Opinion by Ct. Judge Learned Hand, May 14, 1928), two barges in tow of a tug sank and damaged their cargoes as a result of the tug's negligent navigation. Suit was filed by the owners of the cargoes of both barges, and the owner of the tug filed a petition for limitation of liability. The court ruled that the tug and barges must be considered together as a unit within the principle of *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326; and, if the condition of the statute was satisfied, that the owner of the tug was entitled to exemption from liability for damage to the cargo on the barges resulting from the negligent operation of the tug, under the provisions of Section 3 of the Harter Act. However, the court definitely ruled as part of its decision (p. 336):

> "However, it is plain that both vessels must fulfill the conditions of the exemption. In the case at bar the tug proved that she was seaworthy at the outset of the voyage * * *. The same is not true as to the seaworthiness of the barges, as to which no proof whatever was attempted. The record as it stands is defective in this respect, and that proof must be supplied."

The seaworthiness or unseaworthiness of the two inert barges could have no possible connection with the damage resulting from the tug's negligent towage, and yet the decision of the court is clear and unambiguous that the

protection of Section 3 of the Harter Act would not be afforded to the carrier without proof of the seaworthiness of the barges. The court held (at p. 337):

> "This appeal is a new trial, and we can take proof in this court of the seaworthiness of the barges. Unless the appellants choose to concede the issue, the appellees must make proof before William Parkin, Esq., as commissioner, on whose report the case may be again brought on for final determination. If he finds the barges seaworthy, and his report is confirmed, the decree will be affirmed; otherwise, it will be reversed. The appellees must in any event bear the costs of this reference, but, if the decree is affirmed, the appellants will bear the general costs of the appeal."

In *The Waalhaven*, 36 Fed. (2d) 706 (C. C. A. 2nd Circ.; Circuit Judges Learned Hand, Swan and Chase; opinion by Ct. Judge Learned Hand, December 9, 1929), it was found that the vessel sailed on her voyage in an unseaworthy condition, but the subsequent disaster in which she was involved had no causal connection with the unseaworthiness. Insufficiency of the bunkers made her unseaworthy; she was damaged while being forced through fields of ice. In the course of the opinion it was said (p. 709):

> "We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A., §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, * * *."

It will be noted that Judge Learned Hand did not state which way the question we are now considering was well settled, but his subsequent reference to this case in *Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 Fed. (2d) 700, at page 702 (quoted *supra*, in the Petition at pp. 8, 9), clearly discloses that what he meant was that it was well settled

that unseaworthiness through lack of due diligence defeated the carrier's right to the exemptions of Section 3, whether the unseaworthiness had any relation to the disaster or not. Of course the discussion in *The Waalhaven,* which we have quoted, is *obiter dictum;* the vessel owner was held liable for deviation.

In *Louis-Dreyfus* v. *Paterson Steamships, Ltd.*, 43 Fed. (2d) 824 (C. C. A. 2nd Circ.; Circuit Judges Learned Hand, Chase and Mack; opinion by Ct. Judge Learned Hand, July 21, 1930), grain was shipped at Duluth on two large steamers owned by the respondent for through carriage to Montreal, with transshipment at Port Colborne. Part of the grain was transshipped at Port Colborne on the "Advance" which stranded during the course of her subsequent voyage as a result of negligence in navigation, and her cargo was badly damaged. The carrier relied upon the exemptions of both Section 3 of the Harter Act and Section 6 of the Canadian Water Carriage of Goods Act. While the "Advance" was not a vessel "transporting merchandise or property to or from any port in the United States of America" (Harter Act, Section 3), the argument advanced was that as the contract of carriage was for through transportation from Duluth to Montreal, the carrier was entitled to the protection of Section 3 of the Harter Act. The Court said (p. 826):

> "We shall assume *arguendo* that Section 3 of the Harter Act did not cover the case; verbally it only includes 'vessels transporting merchandise or property to or from any port in the United States.' The point is not raised in any event, since there is no proof of the seaworthiness of the vessels clearing from Duluth, which lifted the wheat. If the 'Advance' is to be identified with these, the substitution being ignored, at least all three ships concerned must be shown to be seaworthy."

Of course, any unseaworthiness of the first two vessels could have no possible connection with the negligent navi-

gation of the on-carrying vessel. As the Court found that the carrier was entitled to exemption from liability under Section 6 of the Canadian Water Carriage of Goods Act, the language we have quoted may be considered *obiter dictum.*

In *Hartford & N. Y. Transp. Co. v. Rogers & Hubbard Co.*, 47 Fed. (2d) 189 (C. C. A. 2nd Circ.; Circuit Judges Manton, Augustus N. Hand, and Chase; opinion by Ct. Judge Augustus N. Hand, Jan. 5, 1931), the court found that the vessel involved was in all respects seaworthy and that the damage to cargo involved in the suit resulted from negligence in navigation. The court, however, delivered the following *dictum* (at p. 192), which it cites as authority for its decision in the present case.

> "While it is contended that the Harter Act (46 U. S. C. A., §§190-195) requires the owner to provide a ship that is in all respects seaworthy before he can take advantage of the exemptions under that act, this requirement affects only causes of action for damages *resulting* from unseaworthiness. It is not enough to displace the contract of affreightment and to deprive the vessel of the exemptions of the Harter Act that she was unseaworthy, if the damage was not caused by the unseaworthiness. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *The Turret Crown* (C. C. A.), 284 Fed. 439; *The Turret Crown* (D. C.), 282 F. 354; *The Thessaloniki* (C. C. A.), 267 F. 67. In view of the foregoing, the language of Judge Morris in *The Willdomino* (C. C. A.), 300 F. 5, at page 11, to the effect that a carrier is liable 'wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel' cannot be regarded as in accord with the authorities."

In *The R. Lenahan, Jr.-John J. Ryan-Carlotta,* 48 Fed. (2d) 110 (C. C. A., 2nd Circ.; Circuit Judges Learned Hand, Chase and Mack; opinion by Ct. Judge Learned Hand, March 9, 1931), the court cited its prior decision *In re O'Donnell,* 26 Fed. (2d) 334, and again held that, where a tug and tow together engaged in the carriage of cargo, if the owner would secure exemption from liability for damage to cargo on the barge resulting from negligence in the navigation of the tug, under the principle of *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, there must be proof that

> "* * * the flotilla was seaworthy and well manned, an issue on which the claimant has the burden" (p. 112).

In *Comp. Gen. de Tabacas de Filipinas* v. *U. S.,* 49 Fed. (2d) 700 (C. C. A., 2nd Circ.; Circuit Judges Learned Hand, Swan and Chase; opinion by Ct. Judge Learned Hand, May 4, 1931), the court pointed out the conflict in its various decisions and *dicta* on this point and said:

> "Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion" (p. 702).

We have quoted from the opinion in the above case in the the petition (*supra,* pp. 8, 9).

In the light of this analysis of the decisions and dicta in the Second Circuit, we submit that it is very doubtful whether the decision in the present case can be accepted as settling the law of this Circuit. Even if it be assumed that the decision in the present case will be final, we submit that it is erroneous and should be reviewed by this Court.

(3) *The decision of the Circuit Court of Appeals in this case is directly contrary to the settled law of the Third Circuit.*—

We think there can be no dispute as to the clear conflict between the Second and Third Circuits on this point. As stated in the petition (*supra*, pp. 6, 7), the rule of the Third Circuit was very clearly stated in *The Willdomino*. This rule was expressly rejected by the Circuit Court of Appeals for the Second Circuit in *Hartford & New York Transportation Co.* v. *Rogers & Hubbard Co.* (*supra*, p. 28); and the ruling in that case is cited as authority for the decision of the Circuit Court of Appeals in the present case. Accordingly, there is a clear conflict between the decisions in the two Circuits, which can only be settled by this Court.

(4) *The decision of the Circuit Court of Appeals in the present case is contrary to the rule as several times stated by this Court.*

We have quoted in the petition (*supra*, p. 8), the language of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, at page 226. We agree that this language was not necessary to the decision; but we submit that it is clear and unmistakable.

In *The Wildcroft*, 201 U. S. 378, this Court again considered Section 3 of the Harter Act and said (at pp. 388-9):

> "The relief afforded by the third section of the Harter Act to the owner of a vessel, transporting property, is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act.
>
> To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does

> so *upon the distinct condition* that the owner shall show that the vessel was *in all respects* seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end that the law relieves him of the liability which he would otherwise incur." (Italics ours.)

In this case also the language above quoted was not necessary to the decision, as this Court affirmed the decision of the court below, that the vessel was in fact seaworthy.

See also *The Southwark*, 191 U. S. 1, at page 16.

POINT II.

Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act.

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen; that the owner had intervened at Bremen through its marine superintendent; and that the decision to sail the vessel at night in her crippled condition was made by the owner's marine superintendent and not by the master. It appears that the marine superintendent was in touch with the Home Office

of the company, which was in Hamburg, not far away; that he was fully informed of all that was done at Bremen and assumed full responsibility. No certificate of seaworthiness was obtained from an independent surveyor; the drydock was not entirely pumped out and the only examination of the rudder was made at night, while it was partly submerged, and without the aid of a diver. It is entirely clear from the evidence that the master himself would not have assumed the responsibility of sailing the vessel in her crippled condition. Nevertheless, the Circuit Court of Appeals decided, as we read the opinion, that the owner is entitled to the protection of the Third Section of the Harter Act, because that section was complied with before the "Isis" sailed from the Pacific Coast. The rule laid down by the Circuit Court of Appeals appears to be that if a shipowner fulfills the condition of Section 3 of the Harter Act at the port of shipment, nothing that he does afterward will deprive him of the exemption provided in that section. He may take charge of the vessel at a subsequent port of call and render her wholly unseaworthy; but he is still entitled to the protection of the Harter Act as to any cargo damage which does not result from the unseaworthiness.

We know of no authority in support of this decision, and it is not sustained by any of the decisions cited by the Circuit Court of Appeals in its opinion. All of these were cases where the fault or negligence at the intermediate port was that of the master or officers of the ship, without the knowledge of the owners and without any intervention on their part. This was specifically pointed out in the case of *The Guadeloupe*, 92 Fed. Rep. 670, where Judge Brown said (at p. 671):

> "It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were appar-

> ently needed in order to determine what repairs were necessary. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination."

The decision in the present case is not only unsupported by authority, but is contrary to all the authority we have been able to find on the subject.

In *The Willdomino*, 300 Fed. 5 (C. C. A. 3rd Circ.; affirmed 272 U. S. 718), the vessel loaded the libellant's cargo at Messina, Italy, for transportation to New York. After leaving Messina, she put in at Gibraltar for bunkers, and subsequently also bunkered at Lisbon and Ponta Delgada. The amount of coal taken on by the vessel was found to have been insufficient and it was held that this rendered her unseaworthy when she sailed from these coaling ports for New York. The owners were held liable for damage to cargo resulting from a subsequent stranding of the vessel due to negligent navigation. The failure of the vessel to take on a sufficient quantity of coal was due to instructions contained in a cablegram sent by the vessel owners to the master while the vessel was in the port of Gibraltar.

At page 15 of the opinion, the Circuit Court of Appeals for the Third Circuit said:

> "The acts of the vessel in leaving Gibraltar, Lisbon, and Ponta Delgada with an inadequate supply of fuel is attributable as a matter of law to the owners of the vessel. *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *British & Marine Ins. Co.* v. *Kilgour S. S. Co.*

(D. C.), 184 Fed. 174, 177. It is likewise so attributable in fact. While the 'Willdomino' lay at Gibraltar, the master received from the claimant the following cablegram:

> 'Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler.'

> As the vessel was not seaworthy when she sailed from Lisbon or Ponta Delgada, and as the claimant did not exercise due diligence to make her seaworthy before leaving those ports, the conditional exemption provided by section 3 of the Harter Act cannot be availed of if the damage to the cargo occurred through the fault or error in navigation."

In affirming the decision of the Circuit Court of Appeals, this Court referred to the "willful failure to take on sufficient coal", and the opinion shows clearly that the owner was held personally responsible for this default.

In the opinion in the present case the Circuit Court of Appeals said, in considering the point now under discussion (Rec., p. 714):

> "In *The Willdomino* case, the fault arose at the inception of the voyage."

We submit that the court was clearly in error in making this statement. In *The Willdomino* the cargo involved in the suit was shipped at Messina, Italy, and the fault of which the Circuit Court of Appeals for the Third Circuit spoke, was in connection with bunkering at the way ports of Gibraltar, Lisbon and Ponta Delgada.

In *The Waalhaven*, 36 Fed. (2d) 706 (C. C. A. 2nd Circ.), cargo was laden on the vessel at Nordenham, Ger-

many, for transportation to Wilmington, N. C., and Jacksonville, Fla. She ran out of bunkers during the course of her trans-Atlantic voyage and put in at St. Johns, N. F., as a port of refuge, to rebunker. The master had planned to take on sufficient bunkers there to complete his voyage, but he received direct cable instructions from his owners to take only sufficient bunkers to reach Louisburg, Nova Scotia, where he should rebunker for the remainder of the voyage. In following the course ordered by the owners, the vessel sustained damage by ice and her cargo was seriously damaged. The greater part of the opinion has relation to the doctrine of deviation. However, the vessel owner urged that the master's action, in sailing from St. Johns with insufficient bunkers for the remainder of the voyage, was a mistake in management within the protection of Section 3 of the Harter Act. In dealing with this contention, the court said (p. 709):

> "Obviously this was not due to a mistake of management; *it was because of the owner's command.* We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A. §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, but we need only decide that, whatever the master would have done, had he been left to himself, *he was not free; as he testified, he had to follow his orders.*" (Italics ours.)

In the present case we stressed *The Waalhaven* decision in our argument and brief in the Circuit Court of Appeals, but that decision is not mentioned in the opinion of the court.

In *The Valentine*, 131 Fed. 352 (E. D. N. Y.), a steam lighter was caught in an ice jam and sank as a result of the negligence of her master in not keeping any watch.

The lighter was employed in transportation in New York harbor and her owners were fully aware of the fact that after the vessel tied up at destination, no watch would be kept. In the course of the opinion the court said (p. 355):

> "But if the owners of the ship know that on the voyage, or *at ports intermediate or otherwise*, or on the seas, the fires will be banked, the water for steam allowed to get cold, and that the captain and engineer will go ashore, and the rest of the crew will go to sleep, and that there is no method of being forewarned of leaks, and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. *If the Harter Act was expected to absolve owners under such conditions, it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.*" (Italics ours.)

We submit that the principle stated or applied in *The Willdomino* (*supra*), *The Waalhaven* (*supra*), and *The Valentine* (*supra*), is sound and in accordance with the purpose of the Harter Act. If a shipowner intervenes at an intermediate port, we submit that he is subject to precisely the same responsibility, so far as the Harter Act is concerned, which rests upon him at the original port of lading. This principle applies with especial force in a case like the present, where the events at the intermediate port resulted in starting what amounted to an entirely new venture. Setting out from Bremen in tow and with the rudder lashed, can scarcely be regarded as a mere continuation of the original voyage.

If the master had personally taken the responsibility for what was done at Bremen, and the owners had been far distant and had taken no part in the decision, it may well be that the owners would still be entitled to the protection of the Harter Act.*. It is perfectly clear, however, that if the owners had not intervened, the master would not have taken any such responsibility. It was the owners who decided not to have the ship repaired at Bremen; and ordered the expedient of having the vessel towed to Hamburg.

Intervention by the owners was not through some minor representative. Captain Reichenbacher was the respondent's nautical director and marine superintendent (Rec., fols. 357, 599). His office was in the respondent's main office at Hamburg (fol. 629). He was sent from Hamburg to Bremen to take charge of the "Isis" by the respondent's Board of Directors, who gave him power to act for the respondent (fols. 629-30).

He testified that he made the decision that the rudder should be lashed and the vessel towed to Hamburg (fol. 630); that he was fully aware that the Bremen shipyards could have repaired the "Isis" (fol. 632); and that he made the decision for the repairs at Hamburg rather than at Bremen for the respondent's benefit (fols. 633, 950). He saw the vessel in drydock and was one of those who made such examination of the rudder blade as was made (fols. 605, 943-4). He knew that the drydock was not completely pumped out to permit visual examination of the bottom part of the rudder. He was there and knew that the examination being made of the rudder was made during darkness (fols. 943-4); and that the only test being made for straightness was to put a "small piece of wood" against it (fols. 943-5, 954-6). He was there when the rudder was made fast amidships and saw the work done (fols. 607-9). He had a conversation with the classification surveyor about a certificate of seaworthiness (fols.

612-4), and knew that the "Isis" was sailing without an examination by the classification surveyor and without a certificate of seaworthiness (fols. 639-44). He formed the opinion that it was better for the ship to sail in the daytime and knew that the ship was sailing at night (fol. 615). He had the same opinion at the time he testified (fols. 644-5). He knew that the channel of the Weser River, on which Bremen is situated, is narrow and winding, as is the channel of the River Elbe, up which the "Isis" would have to navigate to reach Hamburg, and that navigation on the two rivers is hazardous at best (fols. 636-7).

The testimony establishes clearly that the respondent took control of the situation from the master and ordered the procedure to be followed. The master looked to Reichenbacher for guidance. He referred to Reichenbacher in his testimony as his boss (fol. 499), and he testified that Captain Reichenbacher ordered the pilot and the tugs for a night sailing (fol. 504).

It further appears that the course decided upon by Captain Reichenbacher was known to and approved by the Home Office of the respondent in Hamburg. We quote as follows from the testimony of the respondent's witness, Brandt (fols. 552-3):

> "Q. Is it not a fact that the decision to proceed to Hamburg from Bremen without repairs being made at Bremen was made by the head office in Hamburg and not by the Captain? A. Yes, by the head office, not by the Captain."

If any further confirmation is needed on this point, it can be found in the testimony of respondent's witnesses, Mr. Warns (fols. 928-9), and Mr. Dahlstrom (fols. 570-1). The testimony of these witnesses makes it clear that Captain Reichenbacher reported directly to his superiors in Hamburg.

It is clear that the Home Office of the respondent knew and approved of the plan to tow the "Isis" to Hamburg without making repairs; and that this course could not have been followed without their approval.

We submit that the decision in the case now on appeal, on this issue, is directly in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The Willdomino* (*supra*); and is also directly in conflict with the views expressed by the Circuit Court of Appeals for the Second Circuit in *The Waalhaven* (*supra*).

CONCLUSION.

We respectfully submit that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit, because of the importance of the questions presented; because the decision in the present case is directly contrary to the settled law of the Third Circuit; and because of the long series of conflicting decisions by the Circuit Court of Appeals for the Second Circuit.

Dated, May 18, 1933.

Respectfully submitted,

D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This supplemental brief is filed solely to bring to the attention of this Court the decision handed down on June 22, 1933, by Judge Patterson in the United States District Court for the Southern District of New York, in the case of *Merklen* v. *Johnson & Higgins, et al.*, 3 Fed. Supp. 897.

In our petition and brief we pointed out that the decisions in the Second Circuit are hopelessly conflicting on the question whether lack of due diligence and unseaworthiness, not contributing to a subsequent loss, will deprive a ship-owner of the exemption granted in Section 3 of the Harter Act (Act of Feb. 13, 1893; U. S. C. Title 46, Sec. 192). We also stated that decisions on this point, in future cases in the Second Circuit, would apparently de-

pend on how the bench was constituted. It appears from the opinion in *Merklen* v. *Johnson & Higgins* that Judge Patterson shares our view as to the unsettled state of the law in the Second Circuit. In considering the argument that there must be a causal connection between unseaworthiness and disaster to defeat the carrier's exemption under Section 3 of the Harter Act, Judge Patterson says:

> "While the trend of decisions in this circuit seems to be to that effect, it is questionable whether the Circuit Court of Appeals has as yet definitely committed itself on the point. *The Elkton,* 49 Fed. (2d) 700; but see *The Isis,* 63 Fed. (2d) 248." (3 Fed. Supp. @ p. 898.)

The last case cited by Judge Patterson (*The Isis*) is the present case. It will be noted that Judge Patterson took the position that the decision of the Circuit Court of Appeals in the present case could not be considered as the final law of the Second Circuit, and in spite of that decision, he felt free to adopt a different view as to a clause substantially identical.

Respectfully submitted,

D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

No. 80

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF FOR PETITIONERS.

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INDEX.

	PAGE
Official Reports of the Opinions Below	1
Statement of the Grounds on Which the Jurisdiction of the Court is Invoked	1
Statement of the Case	2
Decision of the Circuit Court of Appeals	5
Specifications of Error Intended to be Urged	6
POINT I—A shipowner is not entitled to the benefits of Section 3 of the Harter Act unless he establishes as a condition precedent that his vessel was seaworthy, or that due diligence was used to make her so, irrespective of whether or not there was any causal connection between the lack of due diligence and the ensuing damage	7
POINT II—Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act	24
POINT III—The Circuit Court of Appeals erred as a matter of law in holding that the unseaworthiness of the "Isis" did not contribute to her second stranding because means were available to her navigators to counteract the effects of the unseaworthiness	34
(a) The rudder blade of the "Isis" was bent when she left Bremen, and this fact, coupled with the ignorance of her navigators, that it existed, contributed to the second stranding	35
Seaworthiness	35

PAGE

The Bend in the Rudder..... 36
Due Diligence..... 38

(b) There is a complete absence of proof that the navigators of the "Isis" were competent to direct the movements of the flotilla which undertook to navigate the Weser River at night..... 49

CONCLUSION—The decree of the Circuit Court of Appeals should be reversed..... 51

APPENDIX..... i

TABLE OF CASES CITED:

PAGE

Bellota, The, 57 F. (2d) 264, 5 (S. D. N. Y.) x

Boston Marine Insurance Company v. *Met. Redwood Lumber Co.*, 197 Fed. 703 22

Carib Prince, The, 170 U. S. 655 10

Edwin I. Morrison, The, 153 U. S. 19, 211, 215 44

Elkton, The, Comp. Gen. Tabacos de Filipinas v. *U. S.*, 49 F. (2d) 700 ..... 15, 44, 45, 46, 47, 48

Enterprise, The, 8 Fed. Cas. #4497 at p. 731 x

Fanwood, The, 61 Fed. 523, 525 (S. D. N. Y.) x

Fort Morgan, The, 284 Fed. 1, 4 (C. C. A. 4 Circ.) 9

Germanic, The, 124 Fed. 1, 5 (C. C. A. 2 Circ.) (affirmed 196 U. S. 589) 9

Glymont; U. S. v. *American Trading Co.*, 66 F. (2d) 617 ..... 32, 34

Guadeloupe, The, 92 Fed. 670 25

Hartford Accident Co. v. *Bunn*, 285 U. S. 169 2

Hartford & N. Y. Transp. Co. v. *Rogers & Hubbard Co.*, 47 F. (2d) 189 21

Humarock, The, 234 Fed. 716 (D. C. S. D. Ga.) 26
272 U. S. 718, 727 29

Indien, The, 1933 American Maritime Cases, p. 1342 (U. S. D. C. So. D. Calif., Central Div., August 23, 1933) 20

In re O'Donnell, et al., 26 F. (2d) 334 (C. C. A. 2nd Circ., 1928) 14, 17

International Navigation Co. v. *Farr. & Bailey Mfg. Co.*, 181 U. S. 218 ..... 10, 11, 18

Irrawaddy, The, 171 U. S. 187, 189 ..... 8, 9

Jason, The, 225 U. S. 32, 49 ..... 7, 8, 9

Jeanie, The, 236 Fed. 463, 471 (C. C. A. 9 Circ.) 9

Lisbonense, The, 53 Fed. 293, 301 (C. C. A. 2nd Circ.) x

Louis-Dreyfus et al. v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824 (C. C. A. 2nd Circ., 1930) 16

PAGE

Maggie Hammond, The, 9 Wall. 435 at p. 444..... 9
Malcolm Baxter, Jr., The, 277 U. S. 323, 332.....21, 29
Merklen v. Johnson & Higgins, et al., 3 F. Supp. 897 (S. D. N. Y.)..... 17

Newport, The, 7 F. (2d) 452, 454 (C. C. A. 9 Circ.)... 9

Oritani, The, 40 F. (2d) 522 (D. C. E. D. Pa.) aff'd. 54 F. (2d) 1075.....26, 27

Potomac, The, 8 Wall. 590, 594..... ix

River Meander, The, 209 Fed. 931 (S. D. N. Y., 1913).. 12
R. Lenehan, Jr., The—John J. Ryan—Carlotta, 48 F. (2d) 110 (C. C. A. 2nd Circ., 1931)..... 17
R. P. Fitzgerald, The, 212 Fed. 678 (C. C. A. 6th Circ.) 19

Sacramento Nav. Co. v. Salz, 273 U. S. 326, 329.....9, 14, 17
Southwark, The, 191 U. S. 1, p. 16..... 12
Spencer Kellogg Co. v. Hicks, 285 U. S. 502, 511..... 32
St. Paul, The, 277 Fed. 99 (S. D. N. Y., 1921)..... 13

Texas & Gulf S. S. Co. v. Parker, 263 Fed. 864, 867 (C. C. A. 5th Circ.)..... 26
Thessaloniki, The, 267 Fed. 67 (C. C. A. 2nd Circ.).... 22
Turret Crown, The, 282 Fed. 354 (S. D. N. Y., 1922).. 13
Turret Crown, The, 297 Fed. 766..... 14

Valentine, The, 131 Fed. 352 (D. C. E. D. N. Y.)..26, 30, 31

Waalhaven, The, 36 F. (2d) 706 (C. C. A. 2nd Circ., 1929) 15, 26, 29, 31, 34
West Kebar, The; American-West African Line v. Socony Vacuum Corp. et al., 1933 A. M. C. 1364, 1370 (not yet reported elsewhere)..... 8
Wildcroft, The, 201 U. S. 378.....10, 11, 12, 50
Willdomino, The, 300 Fed. 5 (C. C. A. 3rd Circ.) 18, 19, 27, 28, 29, 31, 34
W. Talbot Dodge, The, 15 F. (2d) 459, 460 (S. D. N. Y.)..... x

Statutes Cited:

PAGE

Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. C. Title 28, Section 347) 2

Article 3, Section 2, Clause 1 of the Constitution of the United States of America 2

Harter Act (Act of February 13th, 1893; U. S. C. Title 46, Secs. 191, 192, 193) 5, 9, 21, 22, 26, 31, 34, 43, 46

Section 1 9

Section 2 9

Section 3

5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 22, 23, 24, 25, 30, 48, 49

Canadian Water Carriage of Goods, Act, Section 6.... 16

Act of March 3rd, 1851 (R. S. 4283; U. S. C. Title 46, Sec. 183) 22, 32

Miscellaneous:

International Rules, Article 4 35

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—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Official Reports of the Opinions Below.

The opinion of the Circuit Court of Appeals (R. 555) is reported in 63 F. (2d) 248. The report of the Special Commissioner (R. 499) and the opinion of the District Court confirming his report (R. 543) are reported in 57 F. (2d) 265.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked.

(1) The decree to be reviewed is that of the Circuit Court of Appeals, dated February 21, 1933 (R. 564).

The petition for certiorari was filed May 19, 1933, and the writ was granted October 9, 1933.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347), and under Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

Your petitioner, Louis H. May, is the assignee of the owners of certain merchandise which was laden on the German Motorship "Isis", in December, 1927, at various ports on the Pacific Coast of Canada, the United States and Central America, consigned to Hamburg. Your petitioners, Indemnity Insurance Company of North America and Royal Indemnity Company, are the stipulators for libellant's costs against whom a decree for costs was entered in the District Court, and have been made parties hereto pursuant to the decision of this Court in *Hartford Accident Co.* v. *Bunn,* 285 U. S. 169. Your petitioner, Louis H. May (hereinafter referred to as "the petitioner"), filed five separate libels against the respondent (which were later consolidated under the above title) in the United States District Court for the Southern District of New York. The case was referred to a commissioner and thereafter, on his report, a decree was entered dismissing the libels. Thereafter, your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court.

The "Isis" was a general ship engaged in the common carriage of merchandise by sea. She was owned and operated by respondent. At the time of sailing from her various loading ports on the Pacific Coast she was seaworthy. While proceeding up the Weser River, on her way to Bremen, Germany, which was her first discharging port, she stranded owing to negligence in navigation, and sustained certain damage, including a 45° twist in her

steel rudder stock, which was some nine inches in diameter (R. 93). With the assistance of tugs she proceeded to Bremen, and while so proceeding she showed a marked tendency to sheer to starboard. On arrival at Bremen she was put in drydock, but the dock was not entirely pumped out, and at the time the vessel was examined (which was after dark, R. 90) the lower part of her rudder was under water (R. 89, 106, 127).

The respondent had dispatched its marine superintendent, Reichenbacher, from its head office at Hamburg, and he was present when the "Isis" was drydocked at Bremen (R. 157-8). The rudder blade could easily have been lifted out of the ship while she was in drydock, and, with the stock, straightened and replaced within 6 or 8 days time (R. 333-4, 357-8). There were large and efficient shipyards at Bremen, fully capable of effecting all repairs to the "Isis", thereby permitting the ship to sail under her own power and with her own steering facilities, of which Reichenbacher was aware (R. 44, 166, 171, 197). Nevertheless, after consultation with the head office of the respondent (R. 144, 149, 250), Reichenbacher decided that the vessel should proceed to Hamburg without being repaired, with her rudder lashed amidships and with the assistance of three tugs (R. 166). He testified that the reason the "Isis" was not fully repaired before leaving Bremen, was because the respondent, for its own purposes, preferred to have her repaired at Hamburg (R. 167, 255). Under Reichenbacher's direction the vessel set out from Bremen, some 70 miles up the Weser River, at night (R. 112), without obtaining any certificate of seaworthiness (R. 110, 185). After proceeding down the river for some six miles, she took a sheer to starboard, which the tugs were unable to control (R. 112, 182, 473, 505), and again stranded, sustaining damage which made it necessary for her to return to Bremen and there discharge and transship her cargo, in order to make necessary repairs.

When the "Isis" was examined in drydock after the second stranding, with the rudder blade entirely exposed, the lower part of the blade was found bent to starboard. The bend was estimated to be about 5°, but none of the witnesses took any steps to measure it (R. 93-4, 239-41). That portion of the blade where this bend was greatest, had been under water when the vessel was previously in drydock, on which occasion the dock was not fully pumped out.

The master testified that if he had known, when the "Isis" left Bremen, that the rudder blade had the bend in it which was later discovered when she was in drydock after the second stranding, he would not have sailed; that his sailing from Bremen with his rudder lashed amidships was based on the belief that the rudder blade was straight (R. 94-5).

Reichenbacher, respondent's marine superintendent, when interrogated about the 5° bend, testified as follows:

> "I would never undertake a thing like this if I knew the rudder blade was bent. I would not have ordered her to be sent to Hamburg if the rudder blade was bent. I would have ordered her to be put into drydock in Bremen" (R. 254-5).

When the cargo arrived at destination respondent exacted from the consignees cash deposits to secure the payment of general average contribution to the sacrifices and expenses incurred in connection with both strandings.

Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding.

Your petitioner contended that the respondent was not entitled to any contribution from cargo in respect of the second stranding, and this proceeding is prosecuted to recover the amount of the deposits exacted to secure the contributions claimed in respect of that stranding.

The Commissioner (whose findings were accepted by the District Court) found that the respondent had not used due diligence to make the ship seaworthy but that she was in fact seaworthy.

The Circuit Court of Appeals found that the vessel was in fact unseaworthy, but that this fact was immaterial because the unseaworthiness did not contribute to the stranding.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held:

(1) That the "Isis" was unseaworthy when she left Bremen (R. 563).

(2) That the decision to sail the vessel in her crippled condition was made by the owner, through its marine superintendent, and not by the master (R. 560).

(3) That the unseaworthiness of the vessel did not contribute to the second stranding, which was due to negligent navigation (R. 561).

(4) That a lack of due diligence and unseaworthiness not contributing to a subsequent loss does not deprive a shipowner of the exemption granted in Section 3 of the Harter Act (Act of February 13th, 1893; U. S. C., Title 46, Sec. 192) (R. 562).

(5) That the respondent was, therefore, entitled to exemption under Section 3 of the Harter Act, and entitled to recover general average under the terms of the "Jason Clause" in the bills of lading; notwithstanding its personal intervention at the intermediate port of Bremen, and its personal responsibility for the condition in which the "Isis" left that port (R. 563-4).

Both of the lower courts correctly held that the petitioner's right to recover general average deposits was dependent on the same principles which would have governed his right to recover cargo damage.

The case, therefore, presents the following questions:

1. Where a shipowner fails to use due diligence to make his vessel seaworthy, and she is in fact unseaworthy at the time of sailing, can he nevertheless obtain exemption under Section 3 of the Harter Act, in respect of cargo losses resulting from negligent navigation, provided he can satisfy the Court that the unseaworthiness did not contribute to the loss?

2. Where a shipowner intervenes and personally orders a vessel to sail from an intermediate port knowing her to be in a crippled condition and without using due diligence to make her seaworthy, can he obtain exemption under Section 3 of the Harter Act because the vessel was seaworthy at the original port of shipment?

3. Whether unseaworthiness of a vessel which physically contributes to a loss can properly be said not to have contributed in a legal sense because its effect could have been counteracted by skill and diligence on the part of her navigators.

Specifications of Error Intended to be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

I. In holding that lack of due diligence and resulting unseaworthiness do not deprive a shipowner of the exemption granted in the third section of the Harter Act (Act of February 13, 1893; U. S. C., Title 46, Sec. 192) unless

such unseaworthiness contributes to the loss in respect of which the exemption is sought.

2. In holding that a shipowner who personally intervenes and causes his ship to sail from an intermediate port in an unseaworthy condition, through lack of due diligence, is still entitled to exemption under the third section of the Harter Act provided he complied with that section at the original port of loading.

3. In holding that the unseaworthiness of the "Isis" did not contribute to her stranding because its effect could have been counteracted by skill and diligence on the part of her navigators. We submit that this is not a true finding of fact but an erroneous conclusion of law.

POINT I.

A shipowner is not entitled to the benefits of Section 3 of the Harter Act unless he establishes as a condition precedent that his vessel was seaworthy, or that due diligence was used to make her so, irrespective of whether or not there was any causal connection between the lack of due diligence and the ensuing damage.

The bills of lading in this case contained provisions (R. 30, 37) in substantially the same form as that approved by this Court in *The Jason*, 225 U. S. 32, 49; *i. e.*, clauses which either directly or impliedly provide that if the shipowner has used due diligence to make the ship seaworthy, the cargo is to be liable in general average where the sacrifice or expense results from negligent navigation.

It is well settled under the decisions of this Court that a shipowner's right to compel contributions from the cargo owners under the clause above referred to, is subject to the same limitations as are imposed upon a shipowner who

seeks the exemptions afforded by the third section of the Harter Act.

The Irrawaddy, 171 U. S. 187, 189;
The Jason, *supra*.

The rule above stated was followed in the present case and, as far as we are aware, has never been questioned. *Cf. The West Kebar*; *American-West African Line* v. *Socony Vacuum Corp. et al.*, 1933 A. M. C. 1364, 1370 (not yet reported elsewhere). In the present case there was no substantial damage to the cargo; but the requirement of the general average deposits was a clear breach of the contracts of affreightment unless justified by facts which entitled the respondent to claim contribution.

The present case turns upon the proper construction of the third section of the Harter Act (U. S. C., Title 46, Sec. 192), which is as follows:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

It has frequently been held that the Harter Act, being in derogation of common law rights, should be strictly construed.

The Irrawaddy, 171 U. S. 187, 195;
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 329;
The Germanic, 124 Fed. 1, 5 (C. C. A. 2 Circ.) (affirmed 196 U. S. 589);
The Jeanie, 236 Fed. 463, 471 (C. C. A. 9 Circ.);
The Fort Morgan, 284 Fed. 1, 4 (C. C. A. 4 Circ.);
The Newport, 7 F. (2d) 452, 454 (C. C. A. 9 Circ.).

In construing the above section it is important to bear in mind that the Harter Act does not impose any liability but grants certain exemptions on certain express conditions. The first two sections of the Act (U. S. C., Title 46, Secs. 190, 191) are merely declaratory of the law as it stood before they were passed. They forbid carriers to insert in their bills of lading certain types of clauses relieving them of liability for their own negligence or the negligence of their servants. Such clauses were, of course, void at common law. *The Jason, supra*. The third section of the Act gives the carrier a conditional exemption from liability for losses due to certain specified causes. If a shipowner complies with the conditions laid down in this section, the section gives him certain protection which he already had at common law (*e. g.*, in respect of acts of God and public enemies—*cf. The Maggie Hammond*, 9 Wall. 435 at p. 444); it also gives him, *proprio vigore*, certain protection (*e. g.*, in respect of sea perils) which he could otherwise obtain by contract; and also gives him certain protection (*i. e.*, in respect of the negligence of his servants) which he could not legally obtain in any other way than by compliance with this section. A shipowner who does not comply with the condition is in exactly the same position as before

the Act was passed. He can exempt himself, by the terms of his bill of lading from liability for damage due to perils of the sea, latent defects and similar causes, but he cannot exempt himself from liability for damage due to negligence.

The argument is frequently made, on behalf of the shipowner, that Congress could not have intended to impose liability on a shipowner for something which did not cause any damage. The fallacy of this argument is readily apparent. The shipowner is not held liable because he failed to use due diligence, but because his servants have been guilty of negligent navigation. The owner's lack of due diligence merely precludes him from obtaining a statutory exemption and leaves him subject to his ordinary common law liability.

The very structure of the third section of the Harter Act clearly indicates that no causal connection need exist between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. In *The Carib Prince,* 170 U. S. 655, at pages 661-2, this Court held that the Harter Act does not protect the shipowner in respect of damage due to unseaworthiness, even though he has used due diligence to make his vessel seaworthy.

That there need be no causal relation between unseaworthiness and damage in order to defeat the carrier's right to the exemption of Section 3 of the Harter Act, is clearly indicated by the language of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218 and *The Wildcroft,* 201 U. S. 378.

In *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, *supra*, this Court said at page 225:

> "We do not think that a shipowner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

And again at page 226:

> "We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing."

The italicized words "in all respects" appear in the original opinion in italics. While the language "even if the loss occur through fault or error in management" was not necessary to the decision, we submit that it is a clear indication of the opinion of this Court on the precise point involved in the present case.

In *The Wildcroft*, *supra*, this Court said (pp. 388-9):

> "To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does

> so upon the distinct condition that the owner shall show that the vessel was *in all respects* seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end that the law relieves him of the liability which he would otherwise incur." (Italics ours.)

Again in the above quotation, this Court used the words "in all respects", which is precisely the phrase which is nullified by the decision below. It is true that the words "upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy", were not necessary to the decision in *The Wildcroft*, as this Court affirmed the decision of the court below that the vessel was in fact seaworthy. Nevertheless, the purport of these words is unmistakable.

See also *The Southgark*, 191 U. S. 1, p. 16.

The decision of the Circuit Court of Appeals on this point is contrary to a number of its own previous decisions and dicta, as well as prior and subsequent District Court decisions in the Second Circuit. We shall refer to these decisions in the order in which the cases were decided:

In *The River Meander*, 209 Fed. 931 (S. D. N. Y., 1913), the court said (p. 937):

> "Moreover, on the voyage to New York the serious and substantially constant leak in the No. 1 port

> hold, which began shortly after leaving Gibraltar, shows, in my opinion, that the ship was not seaworthy during the voyage. It is said that that leak had nothing to do with the damage to the cargo, which I think is true; but the requirement of the Harter Act is that the owner must provide a ship that is in all respects seaworthy before he can take advantage of the exemptions from liability required by that act."

In *The St. Paul*, 277 Fed. 99 (S. D. N. Y., 1921), the vessel was seized under legal process. The carrier sought exemption, under Section 3 of the Harter Act, in addition to the exemption of the fire statute, claiming that the fire which caused the loss was itself caused by the vessel's remaining in custody of the marshal. The court held (at p. 107), that the carrier's failure to exercise due diligence to make the vessel seaworthy precluded him from claiming exoneration under the Harter Act, apparently without regard to any causal connection between the unseaworthiness and the damage to cargo.

In *The Turret Crown*, 282 Fed. 354 (S. D. N. Y., 1922), the District Court found that the vessel was unseaworthy when she sailed on her voyage, but that the unseaworthiness had no causal connection with the damage to cargo sued for. Upon these facts, Judge Ward held (p. 360):

> "If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerage way did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act (Comp. St. §§8029-8035)."

Accordingly, the libel was dismissed in the District Court. The Circuit Court of Appeals reversed this decision on the ground that the damage to cargo resulted directly from the unseaworthiness of the vessel. Accordingly, the question

now under discussion was not considered or decided in that court (297 Fed. 766).

In re O'Donnell, et al., 26 F. (2d) 334 (C. C. A. 2nd Circ., 1928), two barges in tow of a tug sank and damaged their cargoes as a result of the tug's negligent navigation. Suit was filed by the owners of the cargoes of both barges, and the owner of the tug filed a petition for limitation of liability. The court ruled that the tug and barges must be considered together as a unit within the principle of *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326; and, if the condition of the statute was satisfied, that the owner of the tug was entitled to exemption from liability for damage to the cargo on the barges resulting from the negligent operation of the tug, under the provisions of Section 3 of the Harter Act. However, the court definitely ruled as part of its decision (p. 336):

> "However, it is plain that both vessels must fulfill the conditions of the exemption. In the case at bar the tug proved that she was seaworthy at the outset of the voyage. * * *. The same is not true as to the seaworthiness of the barges, as to which no proof whatever was attempted. The record as it stands is defective in this respect, and that proof must be supplied."

The seaworthiness or unseaworthiness of the two inert barges could have no possible connection with the damage resulting from the tug's negligent towage, and yet the decision of the court is clear and unambiguous that the protection of Section 3 of the Harter Act would not be afforded to the carrier without proof of the seaworthiness of the barges. The court held (at p. 337):

> "This appeal is a new trial, and we can take proof in this court of the seaworthiness of the barges. Unless the appellants choose to concede the issue, the appellees must make proof before William Parkin,

Esq., as commissioner, on whose report the case may be again brought on for final determination. If he finds the barges seaworthy, and his report is confirmed, the decree will be affirmed; otherwise, it will be reversed. The appellees must in any event bear the costs of this reference, but, if the decree is affirmed, the appellants will bear the general costs of the appeal."

In *The Waalhaven*, 36 F. (2d) 706 (C. C. A. 2nd Circ., 1929), it was found that the vessel sailed on her voyage in an unseaworthy condition, but the subsequent disaster in which she was involved had no causal connection with the unseaworthiness. Insufficiency of the bunkers made her unseaworthy; she was damaged while being forced through fields of ice. In the course of the opinion it was said, *obiter* (p. 709):

> "We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A., §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, * * *."

It will be noted that Judge Learned Hand did not state which way the question we are now considering was well settled, but his subsequent reference to this case in *The Elkton; Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 F. (2d) 700, at page 702, clearly discloses that what he meant was that it was well settled that unseaworthiness through lack of due diligence defeated the carrier's right to the exemptions of Section 3, whether the unseaworthiness had any relation to the disaster or not.

In *The Elkton* case (decided in 1931), Judge Learned Hand said (p. 701):

> "The facts do not raise a question argued at the bar: whether a ship's unseaworthiness in a re-

spect which has nothing to do with the loss, will deprive the owner of recourse to the section. The finality of our *dictum* to the contrary in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 192, we need not therefore consider, except to observe that it is contrary to *In re O'Donnell*, 26 F. (2d) 334; Id., 34 F. (2d) 925 (CCA2), and to a *dictum* in the *Waalhaven*, 36 F. (2d) 706 (CCA2). Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion. Here at any rate the unseaworthiness directly caused the loss, and that disposes of the case."

In *Louis-Dreyfus et al.* v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824 (C. C. A. 2nd Circ., 1930), grain was shipped at Duluth on two large steamers owned by the respondent for through carriage to Montreal, with transshipment at Port Colborne. Part of the grain was transshipped at Port Colborne on the "Advance" which stranded during the course of her subsequent voyage as a result of negligence in navigation, and her cargo was badly damaged. The carrier relied upon the exemptions of both Section 3 of the Harter Act and Section 6 of the Canadian Water Carriage of Goods Act. While the "Advance" was not a vessel "transporting merchandise or property to or from any port in the United States of America" (Harter Act, Section 3), the argument advanced was that as the contract of carriage was for through transportation from Duluth to Montreal, the carrier was entitled to the protection of Section 3 of the Harter Act. The court said (p. 826):

"We shall assume *arguendo* that Section 3 of the Harter Act (46 USCA §192) did not cover the case; verbally it only includes 'vessels transporting merchandise or property to or from any port in the United States.' The point is not raised in any event, since there is no proof of the seaworthiness of the vessels clearing from Duluth, which lifted the wheat.

> If the 'Advance' is to be identified with these, the substitution being ignored, at least all three ships concerned must be shown to be seaworthy."

Of course, any unseaworthiness of the first two vessels could have no possible connection with the negligent navigation of the on-carrying vessel. As the court found that the carrier was entitled to exemption from liability under Section 6 of the Canadian Water Carriage of Goods Act, the language we have quoted must be considered *obiter dictum*.

In *The R. Lenahan, Jr.—John J. Ryan—Carlotta*, 48 F. (2d) 110 (C. C. A. 2nd Circ., 1931), the court cited its prior decision *In re O'Donnell*, 26 F. (2d) 334, and again held that, where a tug and tow together engaged in the carriage of cargo, if the owner would secure exemption from liability for damage to cargo on the barge resulting from negligence in the navigation of the tug, under the principle of *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, there must be proof that

> "* * * the flotilla was seaworthy and well manned, an issue on which the claimant has the burden" (p. 112).

On June 22, 1933, subsequent to the filing of the petition in this case, the question whether lack of due diligence and unseaworthiness, not contributing to a subsequent loss, will deprive a shipowner of the exemption granted in Section 3 of the Harter Act, was answered in the affirmative by Judge Patterson in the case of *Merklen* v. *Johnson & Higgins, et al.*, 3 F. Supp. 897 (S. D. N. Y.). That case involved the right of a shipowner to recover general average under a bill of lading clause substantially identical with most of the clauses involved in the present case. The court (at p. 898) said:

> "The defendant concedes that this is the inevitable result upon a literal reading of the contract

of affreightment. The contention is, however, that the contract so read is too harsh, too burdensome on the shipowner, and that the agreement should be construed as permitting general average in all cases except where due diligence has not been used to make the ship seaworthy and there is a causal connection between the unseaworthiness and the danger, damage, or disaster that resulted in loss. But the clause as it stands is unambiguous; the phraseology is that of the shipowner; and it is not apparent by what process a court can change the effect of the words used.

It is said that Section 3 of the Harter Act (46 U. S. C. A., §192) furnishes an analogy; that although under the statute the carrier's exemption from liability for losses due to faults in navigation is literally conditioned upon his exercise of due diligence to make the vessel 'in all respects' seaworthy, it has been held that the carrier does not lose the exemption unless there are present both a failure to exercise due diligence as to seaworthiness and a causal connection between the unseaworthiness and the loss or damage to cargo. While the trend of decisions in this circuit seems to be to that effect, it is questionable whether the Circuit Court of Appeals has yet definitely committed itself on the point. *The Elkton* (C. C. A.), 49 F. (2d) 700; but see *The Isis* (*May* v. *Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft*) (C. C. A.), 63 F. (2d) 248."

The decision of the Circuit Court of Appeals in this case is directly contrary to the rule as announced in other Circuits. In *The Willdomino*, 300 Fed. 5 (C. C. A. 3rd Circ.), after citing *International Nav. Co.* v. *Farr & Bailey Mfg. Co., supra*, the Circuit Court of Appeals for the Third Circuit said (at p. 11):

"It follows, we think, that if the carrier fails to meet that burden he is liable for damage to the

> cargo resulting from negligence of the master and crew in the navigation or management of the vessel, and the carrier is so liable wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel."

The Willdomino was carried to this Court and affirmed (272 U. S. 718); but the question now under discussion was not mentioned in the opinion.

In *The R. P. Fitzgerald*, 212 Fed. 678 (C. C. A., 6th Circ.), while it appears that the unseaworthiness was causally connected with the loss, the court nevertheless indicated that there need be no causal relation between the two in order to establish the carrier's liability. The court said (p. 682):

> "The contention of the claimant that carelessness in cleaning the can was the proximate cause of the damage, and that, being excused by the third section of the act from its results as a fault or error in management, the libellant cannot recover, has no sanction in the law. This is clearly shown by Judge Addison Brown, in *The Manitoba* (D. C.), 104 F. 145, 155, 156. It will be seen that the question is not one of relative operating causes, proximate or remote. It has to do with the circumstances under which the owner of a vessel is relieved by the operation of the act from consequences for which he would have been responsible prior to its enactment, and involves his responsibility for the condition of his vessel at the inception of the voyage to carry the cargo which he has contracted to transport."

The most recent case in which this question was presented is *The Indien*, reported only in 1933 American Mari-

time Cases, page 1342 (U. S. D. C., So. D. Calif., Central Div., August 23, 1933), in which the court held that there need be no causal relation between the unseaworthiness and the loss. At page 1351, the court said:

> "I approach the ultimate question in this proceeding which is: Assuming that unseaworthiness has been sufficiently shown and that due diligence to make the ship and her equipment seaworthy has not been sufficiently proved, is it necessary for libellant to go further and prove that the damage to the 'Ammophos' was proximately caused by the unseaworthiness. I think not, especially as to the unseaworthiness because of overloading. The overloading of a ship is so fraught with danger that whenever it is satisfactorily shown, all the loss or injury that is sustained on the voyage of the overloaded ship should be imposed upon the vessel and the carrier and should not fall upon those who have shipped property or merchandise under the absolute obligation of the carrier to furnish a seaworthy vessel that is fit for the cargo to be carried at the commencement of the voyage.
>
> We find lack of harmony on this question in two circuit courts of appeal that have had occasion to consider it and neither the Supreme Court nor the Ninth Circuit Court of Appeals has directly passed upon the question as far as I have been able to ascertain.
>
> In *Willdomino* (3 C. C. A.), 1924 A. M. C. 889, 300 Fed. 5, it was held that the carrier was liable when it failed to sustain the burden of proving the seaworthiness of the ship or in exercising due diligence to make her so regardless of whether there was any causal connection between the lack of seaworthiness or due diligence and the loss. While in *Spartan*, (2 C. C. A.), 1931 A. M. C. 1, 47 F. (2d) 189, and in *Isis*, 1933 A. M. C. 396, the contrary doctrine was announced, it is to be noted that the

> *Willdomino, supra,* was affirmed by the Supreme Court, 272 U. S. 718, 1927 A. M. C. 129. However, the Supreme Court did not pass upon the question of the necessity of showing a causal connection between the unseaworthiness and the loss."

With the exception of its own dictum in the case of *Hartford & N. Y. Transp. Co.* v. *Rogers & Hubbard Co.* (47 F. (2d) 189, 192), none of the cases cited by the Circuit Court of Appeals lends any support to its decision in the present case.

The decision of this Court in *The Malcolm Baxter, Jr.,* has no bearing on the question presented here. In that case this Court held that the owners' failure to exercise due diligence to make the vessel seaworthy deprived them of any right to exemption under the Harter Act (277 U. S. 323, at p. 331). Apparently the case was cited because of the following statement in the opinion of this Court (at p. 331):

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

This statement, however, clearly has no bearing on the present case. It was made in connection with a bill of lading clause exempting the vessel from liability for "restraints of princes, rulers and peoples". This clause, of course, was perfectly valid at common law, and the shipowners, in claiming the benefit of it, did not require any aid from the Harter Act. If it had been necessary for the shipowners to rely on the Harter Act, they would have failed; for this Court expressly held that they were not entitled to exoneration under that Act. Based on a careful reading of the opinion, and on our knowledge of the case, in which we were of counsel, we feel justified in stating that the decision of this Court in the *Malcolm Baxter, Jr.,* does not lend the slightest support to the deci-

sion in the present case; and so far as it has any bearing on the present case it tends to support the position of your petitioner.

The case of *Boston Marine Insurance Company* v. *Met. Redwood Lumber Co.* (197 Fed. 703), which is also cited by the Circuit Court of Appeals in support of its decision, did not deal with the Harter Act at all, but only involved the Act of March 3rd, 1851, granting shipowners a limitation of liability (R. S. 4283; U. S. C., Title 46, Sec. 183). We respectfully submit that decisions dealing with the Act of 1851 have no possible bearing on the question which arises here under the third section of the Harter Act. It is, of course, well settled that the "privity or knowledge" which will prevent an owner from obtaining limitation under the Act of 1851, is privity or knowledge of something which results in loss or damage. This results necessarily from the express language of the Act of 1851, which grants to a shipowner a limitation of his liability for any "loss, damage, * * * or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner * * *."

In *The Thessaloniki*, 267 Fed. 67 (C. C. A., 2nd Circ.), the decision was that the vessel was seaworthy and that the loss was due to a peril of the sea and not to any negligence in navigation.

As we have already pointed out, a contractual exemption from liability for sea perils is valid at common law; its validity is not dependent upon compliance with the Harter Act. *We cannot emphasize too strongly the fact that the question presented in this case can only arise where the loss is due to "faults or errors in navigation or in the management" of the vessel. It is only in connection with such faults that the exemption from liability is wholly dependent upon compliance with the condition of the Third Section of the Harter Act.*

The decision in the present case is contrary both to the letter and the spirit of the Third Section of the Harter Act. It nullifies the condition expressly stated at the beginning of that Section and places upon the owner of cargo the burden of litigating a question which is wholly irrelevant—namely, whether the shipowner's failure to comply with the condition has contributed to the subsequent loss or damage. In the present case the petitioner was forced to litigate this issue and was defeated, although his contention was certainly logical enough on its face—*i. e.*, that the uncontrollable sheer of the "Isis", which caused the second stranding in the Weser River, was not unconnected with the fact that she had undertaken to navigate a narrow and winding channel at night with her steering gear disabled. Petitioner, of course, had no witnesses to any of the facts, and had to rely on the testimony of experts based on the fact evidence submitted by the respondent. This is precisely the situation which Congress foresaw and guarded against in phrasing the third section of the Harter Act. By that section the shipowner receives an exemption which is in derogation of the cargo owners' common law rights; but this exemption is expressly made conditional on the performance of certain duties. If the condition is not performed, the shipowner is in precisely the same position as if the Harter Act had never been passed. The third section of the Harter Act is, in effect, an offer of immunity; and, like an offer, it must be accepted according to its terms. One who makes an offer is not bound by an acceptance which includes added or different conditions, even though the person who tenders the acceptance is prepared to prove that the new conditions are equally advantageous.

We submit that to permit the shipowner to have the benefit of the third section of the Harter Act, under the circumstancess of this case, would be to ignore the plain language and the clear intent of that section.

POINT II.

Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act.

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen; that the owner had intervened at Bremen through its marine superintendent; and that the decision to sail the vessel at night in her crippled condition was made by the owner's marine superintendent and not by the master. It appears that the marine superintendent was in touch with the Home Office of the company, which was in Hamburg, not far away, that he was fully informed of all that was done at Bremen and assumed full responsibility. No certificate of seaworthiness was obtained from an independent surveyor; the drydock was not entirely pumped out and the only examination of the rudder was made after dark, while it was partly submerged. It is entirely clear from the evidence that the master himself would not have assumed the responsibility of sailing the vessel in her crippled condition. Nevertheless, the Circuit Court of Appeals decided, as we read the opinion, that the owner is entitled to the protection of the third section of the Harter Act, because the "Isis" was seaworthy when she sailed from the Pacific Coast. The rule laid down by the Circuit Court of Appeals appears to be that if a shipowner fulfills the condition of Section 3 of the Harter Act at the port of shipment, nothing that he does afterward will deprive him of the exemption provided in that section. He may take charge of the vessel at a subsequent port of call and render her wholly unseaworthy; but he is still entitled to the protection of the Harter Act as to any cargo loss which does not result from the unseaworthiness.

We know of no authority in support of this decision, and it is not sustained by any of the decisions cited by the Circuit Court of Appeals in its opinion. All of these were cases where the fault or negligence at the intermediate port was that of the master or officers of the ship, without the knowledge of the owners and without any intervention on their part. This was specifically pointed out in the case of *The Guadeloupe*, 92 Fed. 670, where Judge Brown said (at p. 671):

> "It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were apparently needed in order to determine what repairs were necessary. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, *far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination.*" (Italics ours.)

Conceding the rule of *The Guadeloupe*, (*supra*), that negligent inspection or repair by the master of the vessel at an intermediate port following an accident is negligent "management", it does not at all follow that such negligence is "management" when the inspection or repairs are performed by the owner. Section 3 of the Harter Act was designed to relieve the shipowner, on certain conditions, from the common law liability founded upon the doctrine of *respondeat superior*. It may safely be said that there is no case of record relieving a common carrier shipowner from negligence of the shipowner himself. All of the cases on the subject either hold or imply that the carrier is not relieved by Section 3 of the Harter Act for negligent management or navigation of the vessel by the owner himself.

(a) The cases exonerating the shipowner for

negligent repair or inspection at an intermediate port are all cases of neglect on the part of the master.

(b) All these cases state or imply that the reason underlying the decision is that the ship is out of the owner's control.

(c) Those that speak directly on the subject say the carrier is not exempted from negligent management on the part of the owner.

The Oritani, 40 F. (2d) 522 (D. C., E. D. Pa.), affd. 54 F. (2d) 1075;

The Valentine, 131 Fed. 352 (D. C., E. D. N. Y.);

The Waalhaven, 36 F. (2d) 706 (C. C. A. 2nd Circ.);

Texas & Gulf S. S. Co. v. *Parker*, 263 Fed. 864, 867 (C. C. A. 5th Circ.).

The Humarock, 234 Fed. 716 (D. C. S. D. Ga.), is direct authority for the rule that the Harter Act does not relieve a shipowner from his own negligent navigation or management. In that case the master, through whose negligence or error the stranding occurred, was a part owner of the vessel, and the court held that the Harter Act did not exempt his interest from liability.

At pages 729-30 the court stated:

"As far as the other ship owners are concerned, Capt. Foxwell was as to them only the master of the ship, and only their employe. The court does not think that his negligence can be imputed to them. The court, however, is of the opinion, that as far as his interest is concerned, which is a 3/8 interest, inasmuch as the accident was caused by his negligence, the provisions of the Harter Act do not relieve his interest from liability to the cargo owner. The court is therefore of the opinion that, while the

cargo owner cannot in its intervening petition claim damages against the entire ship, or all the interests in the ship, it yet has a maritime lien for its damages against the 3/8 interest owned therein by Capt. Foxwell. The court does not find any direct authority on this precise point, and yet it is of the opinion that the position here taken is in accordance with the principles of equity and the provisions of the act in question.

A question somewhat similar arose under what is known as the Limited Liability Act (Revised Statutes, §§4283, 4285 (Comp. St. 1913, §§8021, 8023)), in *Re Leonard et al.* (D. C.), 14 Fed. 53. In that case Judge Brown held, that although the master, who was a part owner, was privy to the negligence which caused the loss in that case, the other innocent part owners might have the benefit of the statute. The court is of the opinion that the same principle is applicable to the case at bar."

The same conclusion was reached by the District Court in *The Oritani* (*supra*). At page 529, the court said:

"Of course, the Harter Act does not exempt owners from faults of navigation which they themselves commit or which may be said to have been committed at their command by reason of long acquiescence in a known improper practice. To recover on this theory it would be necessary to show, first, that the practice in question was the proximate cause of the loss, and, second, that it was actually known and acquiesced in by the owners."

The decision in the present case is not only unsupported by authority, but is contrary to all the authority we have been able to find on the subject.

In *The Willdomino,* 300 Fed. 5 (C. C. A. 3rd Circ.; affirmed 272 U. S. 718), the vessel loaded the libellant's cargo at Messina, Italy, for transportation to New York.

After leaving Messina, she put in at Gibraltar for bunkers, and subsequently also bunkered at Lisbon and Ponta Delgada. The amount of coal taken on by the vessel was found to have been insufficient and it was held that this rendered her unseaworthy when she sailed from these coaling ports for New York. The owners were held liable for damage to cargo resulting from a subsequent stranding of the vessel due to negligent navigation. The failure of the vessel to take on a sufficient quantity of coal was due to instructions contained in a cablegram sent by the vessel owners to the master while the vessel was in the port of Gibraltar.

At page 15 of the opinion, the Circuit Court of Appeals for the Third Circuit said:

> "The acts of the vessel in leaving Gibraltar, Lisbon, and Ponta Delgada with an inadequate supply of fuel is attributable as a matter of law to the owners of the vessel. *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *British & Marine Ins. Co.* v. *Kilgour S. S. Co.* (D. C.), 184 Fed. 174, 177. It is likewise so attributable in fact. While the 'Willdomino' lay at Gibraltar, the master received from the claimant the following cablegram:
>
> > 'Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler.'
>
> As the vessel was not seaworthy when she sailed from Lisbon or from Ponta Delgada, and as the claimant did not exercise due diligence to make her seaworthy before leaving those ports, the conditional exemption provided by section 3 of the Harter Act cannot be availed of if the damage to the cargo occurred through the fault or error in navigation."

In affirming the decision of the Circuit Court of Appeals, this Court referred to the "wilful failure to take on sufficient coal" (272 U. S. 718, 727); and the opinion shows clearly that the owner was held responsible for this personal fault. In commenting, in a later case, on its decision in *The Willdomino,* this Court said (*The Malcolm Baxter, Jr.,* 277 U. S. 323, at p. 332):

> "There the officers of the vessel, *under direction of the owner,* sailed from Ponta Delgada, bound for New York, all knowing that the supply of fuel was insufficient for the voyage and intending to take the vessel to North Sidney, and we held that the deviation under the circumstances was voluntary and inexcusable." (Italics ours.)

In the opinion in the present case the Circuit Court of Appeals said, in considering the point now under discussion (R. 563):

> "In *The Willdomino* case, the fault arose at the inception of the voyage."

We submit that the court was clearly in error in making this statement. In *The Willdomino* the cargo involved in the suit was shipped at Messina, Italy, and the fault charged to the owner was in connection with bunkering at the way ports of Gibraltar, Lisbon and Ponta Delgada.

In *The Waalhaven,* 36 F. (2d) 706 (C. C. A. 2nd Circ.), cargo was laden on the vessel at Nordenham, Germany, for transportation to Wilmington, N. C., and Jacksonville, Fla. She ran out of bunkers during the course of her trans-Atlantic voyage and put in at St. Johns, N. F., as a port of refuge, to rebunker. The master had planned to take on sufficient bunkers there to complete his voyage, but he received direct cable instructions from his owners to take only sufficient bunkers to reach Louisburg, Nova Scotia, where he should rebunker for the remainder of

the voyage. In following the course ordered by the owners, the vessel sustained damage by ice and her cargo was seriously damaged. The greater part of the opinion has relation to the doctrine of deviation. However, the vessel owner urged that the master's action, in sailing from St. Johns with insufficient bunkers for the remainder of the voyage, was a mistake in management within the protection of Section 3 of the Harter Act. In dealing with this contention, the court said (p. 709):

> "Obviously this was not due to a mistake of management; *it was because of the owner's command.* We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A. §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, but we need only decide that, whatever the master would have done, had he been left to himself, *he was not free; as he testified, he had to follow his orders.*" (Italics ours.)

In the present case we stressed *The Waalhaven* decision in our argument and brief in the Circuit Court of Appeals, but that decision is not mentioned in the opinion of the court.

In *The Valentine,* 131 Fed. 352 (E. D. N. Y.), a steam lighter was caught in an ice jam and sank as a result of the negligence of her master in not keeping any watch. The lighter was employed in transportation in New York harbor and her owners were fully aware of the fact that after the vessel tied up at destination, no watch would be kept. In the course of the opinion the court said (p. 355):

> "But if the owners of the ship know that on the voyage, *or at ports intermediate or otherwise,* or on the seas, the fires will be banked, the water for steam allowed to get cold, and that the captain and engineer will go ashore, and the rest of the crew will

> go to sleep, and that there is no method of being forewarned of leaks, and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. *If the Harter Act was expected to absolve owners under such conditions, it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.*" (Italics ours.)

We submit that the principle stated or applied in *The Willdoming* (*supra*), *The Waalhaven* (*supra*), and *The Valentine* (*supra*), is sound and in accordance with the purpose of the Harter Act. If a shipowner intervenes at an intermediate port, we submit that he is subject to precisely the same responsibility, so far as the Harter Act is concerned, which rests upon him at the original port of lading. This principle applies with especial force in a case like the present, where the events at the intermediate port resulted in starting what amounted to an entirely new venture. Setting out from Bremen in tow and with the rudder lashed, can scarcely be regarded as a mere continuation of the original voyage.

If the master had personally taken the responsibility for what was done at Bremen, and the owners had been far distant and had taken no part in the decision, it may well be that the owners would still be entitled to the protection of the Harter Act. It is perfectly clear, however, that if the owners had not intervened, the master would not have taken any such responsibility. It was the owners who decided not to have the ship repaired at Bremen, and ordered the expedient of having the vessel towed to Hamburg.

In a very recent decision the Circuit Court of Appeals for the Second Circuit has held definitely that where a voyage is by stages, the owner must fulfil the condition of the third section of the Harter Act at the beginning of each stage. In that case a vessel bound from Chile to Japan was obliged to refuel at Honolulu. Because the amount of fuel taken on at Honolulu was insufficient, she was obliged to take salvage assistance, which was made the basis of a claim against cargo for general average contribution. *Glymont; U. S.* v. *American Trading Co.*, 66 F. (2d) 617. We submit that the *Glymont* cannot be distinguished from the present case. Certainly when the "Isis" set out from Bremen in tow of three tugs, with her rudder lashed amidships, she began a new and very distinct stage of her voyage,—if, indeed, this can properly be regarded as a continuation of the same voyage. The fact that the necessity for the new arrangements made at Bremen was not anticipated when the "Isis" left the Pacific Coast, is unimportant in view of the fact that the owners intervened at Bremen and themselves made the new arrangements.

Intervention by the owners was not through some minor representative. Captain Reichenbacher was the respondent's nautical director and marine superintendent (R. 88, 157). He had no superior in this field (R. 165). His office was in the respondent's main office at Hamburg (R. 165). He was sent from Hamburg to Bremen to take charge of the "Isis" by the respondent's Board of Directors, who gave him power to act for the respondent (R. 165-6).

It is clear from the evidence that Reichenbacher was the *alter ego* of the respondent, so that his "privity" or "knowledge" would have been attributable to the respondent even under the strict rule of the Limitation Statute (R. S. 4283, U. S. C. Title 46, Section 183). *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 511.

Reichenbacher testified that he made the decision that the rudder should be lashed and the vessel towed to Ham-

burg (R. 166); that he was fully aware that the Bremen shipyards could have repaired the "Isis" (R. 166); and that he made the decision for the repairs at Hamburg rather than at Bremen for the respondent's benefit (R. 167, 255). He saw the vessel in drydock and was one of those who made such examination of the rudder blade as was made (R. 158-9, 253-4). He knew that the drydock was not completely pumped out to permit visual examination of the bottom part of the rudder (R. 256). He was there and knew that the examination being made of the rudder was made during darkness (R. 253-4); and that the only test being made for straightness was to put a "small piece of wood" against it (R. 253-4, 257). He was there when the rudder was made fast amidships and saw the work done (R. 159). He had a conversation with the classification surveyor about a certificate of seaworthiness (R. 160-1), and knew that the "Isis" was sailing without an examination by the classification surveyor and without a certificate of seaworthiness (R. 168-170). He formed the opinion that it was better for the ship to sail in the daytime and knew that the ship was sailing at night (R. 161). He had the same opinion at the time he testified (R. 170). He knew that the channel of the Weser River, on which Bremen is situated, is narrow and winding, as is the channel of the River Elbe, up which the "Isis" would have to navigate to reach Hamburg, and that navigation on the two rivers is hazardous at best (R. 168).

The testimony establishes clearly that the respondent took control of the situation from the master and ordered the procedure to be followed. The master looked to Reichenbacher for guidance. He referred to Reichenbacher in his testimony as his boss (R. 129), and he testified that Captain Reichenbacher ordered the pilot and the tugs for a night sailing (R. 131).

It further appears that the course decided upon by Captain Reichenbacher was known to and approved by

the Home Office of the respondent in Hamburg. We quote as follows from the testimony of the respondent's witness, Brandt (R. 144).

> "Q. Is it not a fact that the decision to proceed to Hamburg from Bremen without repairs being made at Bremen was made by the head office in Hamburg and not by the Captain? A. Yes, by the head office, not by the Captain."

If any further confirmation is needed on this point, it can be found in the testimony of respondent's witnesses, Warns (R. 249-50) and Dahlstrom (R. 149). The testimony of these witnesses makes it clear that Captain Reichenbacher reported directly to the respondent's Board of Directors in Hamburg.

It is clear that the Home Office of the respondent knew and approved of the plan to tow the "Isis" to Hamburg without making repairs; and that this course could not have been followed without their approval.

We submit that the decision in the case now on appeal, on this issue, is necessarily in conflict with the decision of this Court in *The Willdomino* (*supra*); and is also directly in conflict with the opinions of the Circuit Court of Appeals for the Second Circuit in *The Waalhaven* (*supra*) and *Glymont* (*supra*).

POINT III.

The Circuit Court of Appeals erred as a matter of law in holding that the unseaworthiness of the "Isis" did not contribute to her second stranding because means were available to her navigators to counteract the effects of the unseaworthiness.

The Commissioner summarized his findings of fact and law in an appendix to his report, which appears at pages

533-6 of the record. The District Judge merely adopted the findings of the Commissioner, with one exception which will be mentioned later. His opinion, confirming the Commissioner's report, appears at pages 544-6 of the record. The findings of the Circuit Court of Appeals are to be found in its opinion, which appears at pages 555-64 of the record.

(a) THE RUDDER BLADE OF THE "ISIS" WAS BENT WHEN SHE LEFT BREMEN, AND THIS FACT, COUPLED WITH THE IGNORANCE OF HER NAVIGATORS THAT IT EXISTED, CONTRIBUTED TO THE SECOND STRANDING.

An examination of the findings of fact below discloses that they would not sustain the decision appealed from, even if the construction of the Harter Act adopted by the lower courts were correct.

Seaworthiness.

The Commissioner found as follows:

> "8. If the injury to the rudder blade either existed or did not exist in fact when the vessel was drydocked at Bremen, she was seaworthy for the intended voyage in tow of the tugs described with her rudder lashed amidships" (R. 534).

On its face, this finding appears to be squarely in conflict with the finding of the Circuit Court of Appeals that the "Isis" was unseaworthy. We submit, however, that the conflict is more apparent than real. That the "Isis" was not seaworthy in the ordinary sense is obvious; and that this was recognized by her navigators is shown by the fact that when she sailed from Bremen she was displaying two red lights (R. 460-73), in compliance with Article 4 of the International Rules, to warn all approaching craft that she was a vessel "not under command". A careful reading of the Commissioner's report discloses that he uses the word "sea-

worthy" in a special and limited sense. What he means, apparently, is that although the vessel was crippled and although her rudder, in addition to being lashed amidships, may also have been distorted, it was possible, by the use of the steamer's own engines and the power of the tugs, to counteract these defects.

The Bend in the Rudder.

As to the existence and effect of the bend in the rudder blade of the "Isis", the Commissioner found as follows:

> "3. The injury consisting of a 5° set in the rudder blade was not a contributing cause of the second stranding. If the injury existed, and further if it was sufficient to affect at all the steering of the 'Isis', the power of her engines and the tugs was adequate to correct any tendency to sheer, and there was in fact no difficulty in controlling the 'Isis' until near kilometer 17" (R. 533).

(In connection with the last statement above quoted, we call attention to the fact that it was near kilometer 17 that the vessel was called upon, for the first time after leaving Bremen, to change her course sharply to port, owing to the pronounced bend in the channel at that point; R. 96; Chart, Resp. Ex. 9, R. 548).

> "4. The injury to the rudder blade itself consisted of a set or bend beginning about the middle or below the middle of the rudder and running to a maximum of about 5° from the median line of the vessel at the extreme bottom of the rudder. This injury existed at the time of the second docking at Bremen. There is not any direct evidence that it existed or was known or thought to exist at any time prior to the second docking. The injury may have been caused by the first stranding. It probably could not have been caused by the second

stranding. It might have been due to some occurrence on the two trips up the river and the one trip down the river, but there is no evidence of any such occurrence. It has not been established by the preponderance of the evidence that the injury to the rudder blade in fact either existed or did not exist at the time the vessel sailed from Bremen. The origin of the injury is left to conjecture" (R. 533-4).

(Both the District Court and the Circuit Court of Appeals found that the bend in the rudder blade existed when the "Isis" left Bremen. The Circuit Court of Appeals said;

> "Concededly the vessel had her rudder stock twisted and the lower half of the rudder blade was deflected to starboard 5°" (R. 562).

While the District Judge made no express finding on this point, it is clear from his opinion (R. 545) that he took the same view.

It would seem, therefore, that this fact has been established by concurrent findings of the two lower courts, notwithstanding the Commissioner's finding that it was left in doubt. However, in our view of the law, it makes no difference whether the fact is established or left uncertain. Accordingly, we shall not deal with the evidence in our argument, but shall discuss it in an appendix to this brief, to which the Court may refer if the question is deemed material.)

> "5. The preponderance of the direct evidence, the manoeuver book (Exhibit 7), and the report of the Seeamt investigation (Exhibits A and B) is that the 'Isis' did not develop any *marked tendency** to sheer to starboard on the way down the river before the second stranding; and that if there was any

* *Italics ours.*

such tendency to sheer, the power of the vessel and her tugs was amply sufficient to correct it and to control the vessel" (R. 534).

The Circuit Court of Appeals apparently adopted the finding of the Commissioner on this point. It stated that the bend in the rudder blade was unimportant because

> "competent navigators testified that a 5° bend would not affect the steering *except to a slight extent*"* (R. 562).

Due Diligence.

The Commissioner found as follows:

> "11. Due diligence was not exercised to ascertain the true condition of the rudder at Bremen in that, (a), the rudder could as a practical matter have been taken off altogether for examination or repair; (b), the rudder was not wholly exposed by the examination which was made; (c), the examination was made under unfavorable conditions in the twilight or early evening darkness, and (d), the examination was made without the attendance of a classification or independent surveyor" (R. 535).

The Circuit Court of Appeals made no finding on the question of due diligence at Bremen, as this question was immaterial in its view of the law.

The findings above quoted may be summarized as follows:

1. The owner failed to use due diligence in examining the rudder of the "Isis" when she was dry-docked after the first stranding.

2. As a result of this failure of the owner, the bend in the rudder blade was not discovered. (This is according to the opinions of the District Court and

* *Italics ours.*

the Circuit Court of Appeals. The Commissioner's finding was that, owing to the inadequate examination, the evidence did not establish whether or not the blade was bent when the steamer left Bremen.)

3. The bend in the rudder blade may have had some tendency to make the vessel sheer to starboard; but this tendency could be offset by the use of the vessel's engines coupled with the manoeuvering power of the tugs.

4. Under these circumstances, the defective condition of the vessel did not contribute, in a legal sense, to the second stranding.

We submit that the last of the above findings is not a true finding of fact, but is an erroneous conclusion of law.

In this connection, we call attention to a point on which the Commissioner made no definite finding, but which he discussed in his report. As we have already stated, the master of the "Isis" and Mr. Reichenbacher, the respondent's marine superintendent, both testified that they would not have permitted the "Isis" to sail if they had known her rudder was bent. On this point the Commissioner said:

> "I should have little difficulty in coming to the conclusion that the 5° deflection in the rudder blade had nothing to do with the stranding, did not render the vessel unseaworthy, did not substantially increase the risks of towage, and is generally an immaterial circumstance, were it not for the fact that two of the respondent's witnesses testified very definitely that they would not have sent the vessel on her voyage to Hamburg if they had thought that the rudder of the '*Isis*' was in the condition in which it was afterwards found to be. (Exhibit 13 Reichenbacher, 121; Exhibit 14, Krueger, 67.)*

* (The references to the present record are 254-5; 94-5.)

> It is urged by the respondent that these witnesses may not really have had in mind whether the bend afterwards found was really dangerous, and perhaps merely meant that they would not have sent the vessel to sea if her rudder had been in really dangerous condition. I do not so interpret their evidence, and perhaps technically the respondent is bound by their admissions. My own inference from this evidence is that these two witnesses merely overdid an effort to establish a character for caution. In spite of what they say, it is extremely difficult to believe that they really would not have sent the *'Isis'* on her voyage under tow, even if they had known of a 5° deflection in her rudder blade". (R. 524-5).

From the foregoing it appears that the Commissioner found difficulty in accepting the testimony of the respondent's own master and marine superintendent that they would not have sailed the "Isis" with a 5° bend in the rudder blade; and this notwithstanding the fact that both of these witnesses testified by deposition, and the Commissioner never saw either of them. This somewhat extraordinary attitude on the part of the Commissioner was based on the testimony of experts who had never seen the "Isis". He placed particular reliance on the testimony of a Captain Davis. We quote from the report as follows:

> "On the issue of whether or not it was safe on the trip to Hamburg, assuming that the 5° set in the rudder blade actually existed on sailing from Bremen, considerable expert testimony was produced and hypothetical questions were asked and answered, with the usual inconclusive result. With the exception of the witnesses examined by the respondent abroad, most or all of the expert witnesses lack sufficient familiarity with the actual conditions to go very much beyond generalities. Indeed, even the generalities were not sup-

ported with any persuasive reasons except in the case of Captain Davis, whose appearance and candor in testifying were even more impressive than his experience covering over thirty-three years' activity in salvage work, during most of which time he has been a well-known wreckmaster. He was extremely careful to confine himself to his own knowledge and experience and to the facts actually developed by the testimony and exhibits. His frankness in redirect examination concerning the relative desirability of navigating in daylight or darkness illustrates his attitude in testifying.

Captain Davis considered that the fact that the 'Isis' left Bremen about 5 feet by the stern was of material assistance in controlling the vessel at slow speed with the assistance of tugs. He declared that the tugs as described in the Hamburg testimony were properly located. *While a 5° deflection from the true in the rudder might have affected the steering of the vessel to some slight extent, the tugs provided should have been amply able to overcome any such defect*"* (R. 522-3).

In view of the importance which the Commissioner attached to Captain Davis' testimony, we call this Court's attention to the following testimony of the same witness:

"Q. It would be very important and valuable to know that there was such a bend, would it not? A. Yes.

Q. So that you would know what to expect? A. Yes.

Q. Even a 5 degree bend on there would affect the ship some? A. Yes.

Q. If I understand, you think 15 degrees would be dangerous? A. Yes.

Q. 10 degrees, I gather you think somewhat on the borderline? A. Yes.

* *Italics ours.*

Q. 5 degrees you think can be taken care of? A. Yes.

Q. But you agree with me that the pilot should know it is 5 degrees for it to be prudent for the ship to go out, isn't that true? A. Yes, he should ascertain that the rudder was reasonably straight or turn it loose, not go and tie it up with a bend in it" (R. 407-8).

This is the testimony of respondent's principal expert. It was on the basis of his testimony that the Commissioner found difficulty in accepting the positive statements of the respondent's master and marine superintendent that they would not have sailed the "Isis" with the bent rudder if they had known of it. And yet, even this witness agrees that the navigators of the "Isis" should, at least, have known what the condition of the rudder was; and that if the rudder was bent, it would have been better to let it swing free instead of lashing it admiships. The Commissioner so understood Captain Davis's testimony, as appears from the following passage in his report:

> "The respondent's witnesses gave no explanation of why the rudder was not lifted and the libellant submitted evidence that this course was practical and prudent. *Indeed, Captain Davis thought it would have been better to leave the rudder entirely loose or to take it off altogether.*
>
> This examination left uncertain too much concerning the condition of the rudder blade to be adequate within the very strict rule to which the authorities adhere" (R. 527).*

Moreover, Captain Davis testified as follows:

"By the Commissioner:

Q. Would your answer be any different, Captain Davis, if the rudder in fact was not straight but was deflected from the true about 5 degrees, running from

* *Italics ours.*

> nothing at the center to the maximum of 5 degrees at the bottom? A. May I see the shape of the rudder (referring to Exhibit 6) *if that was ascertained, the rudder could be secured in such a position that the effect would be neutral*" (R. 400-1).*

Captain Davis clearly had in mind that if the rudder was bent it would not be lashed amidships, but in such a position as to neutralize the bend. Of course, nothing of the sort was done because the bend was not discovered and, hence, no steps were taken to neutralize it. The rudder was lashed squarely amidships.

In view of Captain Davis' testimony, we think there can be no doubt that the failure to discover the bend and provide against it was a serious omission. The District Court, although accepting the findings of the Commissioner in other respects appears to have assumed that the bend existed when the "Isis" left Bremen, and made the following comment:

> "Furthermore, no one was aware of the deflection of the blade and consequently no allowance for it could have been made in navigation" (R. 545).

No court has found that the bend in the rudder blade did not physically affect the steering of the "Isis". The Commissioner found that the vessel did not have any "*marked* tendency to sheer"; and the Circuit Court of Appeals found that the bend would not affect the steering "*except to a slight extent*". It is abundantly clear that both the Commissioner and the Circuit Court of Appeals found: not that the bend in the rudder did not physically affect the steering of the "Isis"; but that the effect was slight and could readily be corrected by the means available. We submit that this finding presents a clear question of law which was wrongly decided in the lower courts.

* Italics ours.

Even before the passage of the Harter Act this Court rejected the argument that a shipowner was entitled to exemption from liability on showing that the proximate cause of the loss was an excepted peril. Even where no express condition was involved, it was held that the shipowner must prove that no cause for which he was responsible contributed to the loss. *The Edwin I. Morrison*, 153 U. S. 199, 211, 215. Where the exemption from liability is expressly conditional, as under the Harter Act, the same principle applies with even greater force.

In the case of *The Elkton; Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 F. (2d) 700, the Circuit Court of Appeals for the Second Circuit rendered a decision which is very closely in point. In that case the ship sailed with a tank top which it was thought might be defective. A surveyor recommended that the tank be left empty or slack. The master knew of this recommendation but there was no evidence that the chief engineer did. At a way port the chief engineer ran up the tank with oil and it immediately leaked into the cargo hold and damaged the cargo. We quote from the opinion as follows (at p. 701):

> "A ship may be seaworthy, though not in all respects fit for her service, when she breaks ground. (*The Sylvia*, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241; *International Navigation Co.* v. *Farr*, 181 U. S. 218; 21 S. Ct. 591, 45 L. Ed. 830; *The Steel Navigator*, 23 Fed. (2) 590 (C. C. A. 2); *The President Polk*, 43 Fed. (2) 695 (C. C. A. 2); *The Manitoba*, (D. C.), 104 Fed. Rep. 145). The theory is that if she be well found in hull and gear, *but the master and crew know that she is not made ready as she rides*, and expect to fit her with what is at hand, when the occasion arises, the owner is discharged; it is an error of management if they fail to do so. But existing unfitness, though it arise only from ill handling of adequate equipment, *must be so known at the outset; else*

she is unseaworthy, not being herself suited for her service, and not carrying a crew properly advised as to her needs. (*The Schwan*, L. R. (1909) App. Cas. 450; *Standard Oil Co.* v. *Clan Line*, L. R. (1924) App. Cas. 100). *Thus seaworthiness may depend upon the knowledge of the ship's company as to how far she has been in fact made ready.* The case at bar is an effort to extend this doctrine to a case where the ship is not sound in hull, on the ground that her fault was known. It is argued that the error is still only one of management, provided of course that, if properly handled, she can be made to serve her purposes.

The gloss thus put forward—without the support of any authority—would extend the doctrine to cases *where a crippled ship is turned over to a crew with instructions so to use her as to avoid the consequences.* She will be seaworthy if the crew prove duly attentive. *For instance, if the rudder be bent, the quartermaster may be instructed to make proper allowance in his helm;* if the boilers be weak, the engineer, to keep a low head of steam." (Italics ours.)

* * * * * * * * * *

"These (speaking of the ship's holds) were suitable for sugar only if the tank was not filled, *that is, in the event that the engine-room took care not to use the ship for her normal purposes.*

Section three of the Harter Act (46 U. S. C. A. §192) gives a privilege to the owner, an immunity dependent upon the condition that he use diligence to make his ship 'in all respects' seaworthy, within as well as without. When he does, he is excused from what would otherwise be a breach of his contract, a liability in tort, if one choose, in any event a wrong under the maritime law. By hypothesis he stands at fault but for his compliance with the statute, which then imposes upon the shipper the risk of those

lapses in duty of the owner's servants for which he is ordinarily responsible. When the owner accepts cargo in an unseaworthy ship, the defect be such as may be neutralized by care, *he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas.* It makes no difference whether the defect is in shell or hold; with her whole management the owner is charged unless he does his part. In the case at bar it is therefore immaterial whether the engineer knew that he should not fill the tank. If he did, his forgetfulness, or supposition that the oil would not reach the sugar, was a fault, in management it is true, *but in the management of a ship which required more care than the owner could exact at the shipper's peril.* If the engineer did not know, at least the master did, and his fault is also the owner's." (Italics ours.)

We submit that the facts of the present case present the same question as that decided in *The Elkton.* In an example put by the court in that case, it was suggested that a ship with a bent rudder might be sent out with instructions to the quartermaster to counteract the bend. The court pointed out that if the ship's equipment was used normally but damage ensued because the special instructions were not followed, the vessel owner would not be afforded any protection under the Harter Act. A carrier may not impose on a cargo owner the added risk that the carrier's servants "may neglect those added precautions which her condition demands."

The "Isis" was a crippled ship turned over to her officers to navigate to Hamburg as best they could. She could not be navigated normally because her rudder was lashed.

Furthermore, no special instructions were given nor were special precautions taken in relation to the bend in the rudder, because its existence was not known by reason of the carrier's negligence, as the Commissioner has found.

The respondent chose, for its own purposes, to have the "Isis" navigate to Hamburg with the rudder lashed, although there were ample facilities for repairs at Bremen. In a similar connection the court said in *The Elkton* (p. 701):

> "he (the cargo owner) bears no loss until the (ship) owner has done his best to remove all risks except those inevitable upon the seas."

The Commissioner found that the "Isis" was negligently navigated at too great a speed and too near the bank and that this caused her to "smell" the bank and become unmanageable when passing an ascending vessel. Of course the speed would not be of any importance in relation to "smelling" the bank unless the "Isis" was close to the bank. The only reason advanced either by the respondent or by the Commissioner why the ship was so close to the bank, is that the flotilla made up of the "Isis" and her tugs had a breadth of about 100 feet and that at the place where the upbound vessel was passed, it was necessary for the flotilla to go close to the bank. The respondent has specifically urged that it was grossly negligent for the "Isis", *in her condition*, to attempt to pass the up-bound ship where she did.

It will be noted that the allegations and findings of negligence are that proper care was not employed in navigating the "Isis" under the abnormal conditions presented: with tugs on each side. If she had been navigating normally, she would not have been in convoy of tugs; her beam of 50 feet would have afforded ample room so that the "Isis" could have passed the ascending vessel and left 100 feet between her starboard side and the bank.

So far as concerns speed, the Commissioner found that upon passing the upbound vessel her speed was more than her average speed between Bremen and the place of stranding. We have pointed out that the officers were entirely ignorant of the bend in the rudder. Therefore, they could have had no knowledge that an increased speed would increase the danger of sheering to starboard. The respondent's experts were in accord that the greater the speed of the vessel, the greater the danger of sheering because of a bent rudder (French, R. 393; Davis, R. 407; Huseby, R. 453). We submit that the negligence found by the Commissioner is just the type of negligence which, as pointed out in *The Elkton*, is not within the exemptions of Section 3 of the Harter Act.

The facts of the present case afford a striking illustration of the results which may be expected if the courts relax the condition on which the 3rd Section of the Harter Act grants exemption from liability. In the present case the only finding on the subject is that due diligence was not used to ascertain the condition of the rudder blade. The master of the vessel and the respondent's marine superintendent both testified that they would not have sailed the "Isis" if they had known of the bend in her rudder blade. No one who had anything to do with the vessel contradicted them. The blade was bent to starboard, which would tend to throw the vessel's bow to starboard. The stranding occurred because the vessel actually sheered to starboard. Even the respondent's principal expert on this point (and the only one who had ever commanded a vessel at sea) agreed that the rudder should have been lashed in a position which would neutralize the bend; or, better still, should have been left swinging free or removed altogether. Notwithstanding all of these circumstances, the lower courts have seen fit to discard the testimony of the master and marine superintendent, who actually sailed the "Isis"; to hold, on the basis of expert testimony, that the condition

of the rudder blade did not constitute any ground for not sailing the vessel; and to decide that it did not contribute legally to the stranding because the tugs had ample power to counteract it.

Such results are possible only if the 3rd Section of the Harter Act can be radically amended by judicial legislation.

(b) THERE IS A COMPLETE ABSENCE OF PROOF THAT THE NAVIGATORS OF THE "ISIS" WERE COMPETENT TO DIRECT THE MOVEMENTS OF THE FLOTILLA WHICH UNDERTOOK TO NAVIGATE THE WESER RIVER AT NIGHT.

The channel of the Weser River is about 300 feet wide. The combined width of the "Isis" and the tugs alongside was about 100 feet (R. 515). The Commissioner assumed that ordinary prudence required a clearance of approximately 25 feet on each side (R. 515). Accordingly, the "Isis" required a full half of the channel in which to navigate safely. Considering that the channel of the Weser is not only narrow but tortuous, it is clear that considerable skill is required to navigate a large vessel from Bremen to the sea, even under the best conditions. This was conceded by respondent's marine superintendent, Reichenbacher (R. 168). In the present case the "Isis" had no steering power of her own, excepting such as could be developed by the use of her twin screws. She was dependent chiefly on the three tugs to steer her down the Weser. No system of signals was agreed upon for this purpose, but the manoeuvers of the tugs were directed from the bridge of the "Isis" through a megaphone. It appears that the orders were given by the pilot to the master, and were then transmitted by the master to the tugs through the megaphone (R. 81). Obviously this was a very slow and cumbersome method of steering the "Isis". A vessel of her type is ordinarily steered by steam steering gear operated by a quartermaster under the orders of a navigating officer who stands beside

him. The response to an order is practically instantaneous. Certainly the navigation of such a flotilla as was involved in the present case, is a wholly different problem from the navigation of an ordinary vessel which has the use of her rudder. The Commissioner based his findings largely on the testimony of Captain Davis, and refers to the latter's experience "covering over thirty-three years' activity in salvage work, during most of which time he has been a well-known wreckmaster" (*supra*, p. 41). No doubt Captain Davis' experience was such that he would have been qualified, if any one was, to navigate the "Isis" flotilla. There is no evidence, however, that either the master or pilot of the "Isis" was qualified by training or experience for such a task. The master expressly disclaimed sufficient knowledge of local conditions to pilot the flotilla; and it is clear from his testimony that the pilot was actually directing the navigation (R. 97). The pilot died before the reference in this case, and there is no evidence whatever that he was qualified to navigate a large disabled vessel and three tugboats down the Weser River at night. It may, perhaps, be assumed, without evidence, that he had the ordinary skill of a river pilot; but we submit that there can be no such assumption as to his ability to navigate a flotilla of the kind and under the conditions here involved. The event shows, on respondent's theory, that he handled the flotilla unskillfully; and the record is barren of any evidence that he had the necessary skill or experience to handle it at all. We submit that this situation falls squarely within the language of this Court in *The Wilderoft*, *supra* (p. 388), where it said that the immunity given by the Harter Act is granted

> "upon the distinct condition that the owner shall show that the vessel was *in all respects* seaworthy and *properly manned*, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge

> of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act." (Italics ours.)

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen. The opinion indicates that the court had in mind unseaworthiness of the flotilla as a whole. We submit, as a matter of law, that it cannot be said that such unseaworthiness did not contribute to the stranding. The immediate cause may have been, as claimed by the respondent, an error of the pilot. The record throws no light on the question whether this error arose through negligence or lack of skill. In either event, it is plain that the unwieldy character of the flotilla was a contributing factor in the disaster.

Conclusion.

We submit that a shipowner who sends his vessel to sea in an unseaworthy condition, through lack of due diligence in that respect, cannot apportion or qualify his fault. The courts below have held, in effect, that a shipowner who does not use due diligence to make his ship seaworthy is still not liable for negligent navigation if she is seaworthy in most respects; and if her unseaworthiness contributes only slightly or indirectly to the subsequent disaster. This is not what the Harter Act says; and, we submit, it is not the law.

The decree of the Circuit Court of Appeals should be reversed.

Dated, November 2, 1933.

Respectfully submitted,

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APPENDIX.

It is Established by the Great Preponderance of the Evidence That the Rudder Blade of the "Isis" was Bent to Starboard at the Time of the First Stranding.

As stated in our brief (*supra*, p. 37), the liability of the respondent would appear to be the same whether it is established that the rudder blade of the "Isis" was bent when she sailed from Bremen as found by the District Judge and the Circuit Court of Appeals, or whether this fact is left in doubt as found by the Commissioner. However, we think the evidence on the point is entirely clear and we shall summarize it in this appendix in order that it may be conveniently considered if deemed material.

The Commissioner's finding as to the bend in the rudder blade is as follows (R. 534):

> "This injury existed at the time of the second docking at Bremen. There is not any direct evidence that it existed or was known or thought to exist at any time prior to the second docking. The injury may have been caused by the first stranding. It probably could not have been caused by the second stranding. It might have been due to some occurrence on the two trips up the river and the (fol. 671) one trip down the river, but there is no evidence of any such occurrence."

The Commissioner finds, therefore, that the bend in the rudder blade may have been caused by the first stranding and probably could not have been caused by the second stranding. He also finds that there is no evidence of any other occurrence which might explain the bend. Under these circumstances it would only seem necessary to refer the Court to some definite and persuasive evidence that the

bend not only "may have been caused" but actually was caused at the time of the first stranding.

The officers of the "Isis" are in accord that when she slid off the bank after the first stranding, she hit her stern on the port side against the opposite bank (R. 55, 260-1, 278). The Commissioner found (R. 503):

> "Most, if not all, of the force of the blow fell on the port side of the rudder * * *."

As a result of the impact it was found that the rudder stock, between 225 and 250 millimeters (about nine inches) in diameter (R. 93), had become twisted. The translation of the ship's deck log (Resp.'s Ex. 11, R. 480) includes this language describing the movement when the ship slid off the bank.

> "The ship's stern was then swung around with terrific force by the heavy flood tide, which was made worse by a wind blowing against her beam (WSW force 5). * * * Due to the rapid turning motion of the ship, the two towboats could not go into action in time to catch the fast swinging ship. Because the water was not high enough as yet to let the ship swing around in the narrow channel, she ran with her stern forcibly against the easterly bank and went aground" (R. 481-2).

Captain Krueger agreed that the log book entry was correct; that the "Isis" turned with terrific force (R. 86) and that she hit her rudder against the port bank with great violence (R. 86).

The libellant's experts testified that the impact of a rudder blade with a bank of sufficient severity to twist the rudder stock to the extent this one was twisted, would almost certainly lead to damage to the blade. They agreed that rudder stocks are sometimes twisted without damage to the blade as the result of waves hitting the rudder, and they also agreed that if any pressure is exerted equally

over the face of the blade, the stock might be bent without the blade being bent. That, also, was the purport of the testimony of the respondent's experts: that if the blade is subjected to an even pressure over its entire surface, the stock could be twisted without affecting the blade.

The respondent's argument that the first impact did not damage the rudder blade, must have as its premise that the whole surface of the blade hit squarely against a perpendicular wall of mud (French, R. 384; Jordan, R. 343-4; McGregor, R. 371). There is no evidence establishing any such condition. The bend subsequently found in the rudder blade, was of a type which naturally would result from such an impact as that described here (R. 348, 356).

No trouble of any kind had been experienced in steering the ship prior to the first stranding. Immediately afterwards the vessel was found to sheer violently to starboard and she was navigated to Bremen with the assistance of tugs, with difficulty.

It is the libellant's position that the bottom of the rudder blade became bent as a result of the first stranding and as the bend was not discovered at Bremen, that it existed when the ship sailed from Bremen.

When the ship was examined in drydock after the second stranding, the respondent's witnesses are in accord that the bottom of the rudder blade was bent to starboard. It is true that the witnesses who examined it estimated that the bend was only about five degrees, but not one of them took any steps to measure the bend. Their testimony is merely a rough estimate given at the time of their depositions in August and October, 1930, of a bend which they had examined more than two years before, in February, 1928 (Asmus, R. 240-1; Krueger, R. 67-8).

The respondent argues that the bend in the rudder blade did not exist when the ship sailed from Bremen, but

resulted from the second stranding. This, of course, is contrary to the Commissioner's finding that "it probably could not have been caused by the second stranding."

In support of its argument the respondent has relied on the master's testimony that a short time before the second stranding, the vessel twice touched lightly aft. The log book contains no reference to any such touching, nor was it mentioned in the testimony taken before the Seeamt. No such occurrence was known to the engineers (R. 122) although they naturally would be the first ones to observe it (R. 331). The master admitted that the tugs were bumping the side of the "Isis" so that little notice was taken of the jar which he thought was a touch a[illegible] (R. 122).

According to the master's testimony, the ship was sailing down the river on the starboard side of the channel (R. 98). She passed to the port side of the buoy marking the starboard edge of the channel (R. 66-7, 102) at the junction of the Weser and the Lesum (R. 102-3). It is said that after passing this buoy, the current flowing up the Lesum River swung the bow of the "Isis" to starboard (R. 68), and, following natural laws, the stern, therefore, must necessarily have swung to port. When the "Isis" brought up, the testimony is clear that her stern was in the channel of the Weser River in deep water (R. 67, 104). All the witnesses are in accord (and of course it is common sense as well), that if the rudder blade had hit against the starboard bank, any bend which resulted would necessarily have been to port, or, if the rudder was already bent to starboard, would tend to straighten it somewhat.

The suggestion was advanced in the respondent's examination of its experts, that when the stern of the "Isis" swung to port, the rudder blade may have been bent to starboard by hitting bottom. There is no evidence that any such thing occurred; the master took the position that the ship's stern hit the starboard bank (R. 102-3).

To be persuasive, moreover, there must be evidence that there was a shallow spot which permitted the stern to hit, and there is no evidence supporting such a suggestion. In fact, the evidence is to the contrary.

When the "Isis" was examined in drydock after the second stranding, her stern post was not damaged (R. 134). Exhibit 6, the plan of the "Isis", shows that the stern post was approximately two feet lower than the rudder (R. 496-A). We submit it is impossible to understand how the rudder blade could be bent by contact with the river bottom without causing any damage to the stern post. As Mr. Jordan testified, it would be necessary to have an extraordinary condition to permit some obstruction to dodge the stern post and reach up and bend the rudder (R. 331, 356-7).

However, we submit that the testimony of the respondent's witness, the chief officer, disposes of this whole issue. After testifying that at Bremen the rudder blade was made fast with wire lines to bitts at the after end of the ship, he testified concerning the method employed to make fast the quadrant with screws so that it could not move (R. 263-4).

He testified that the screws remained tight and the quadrant absolutely braked from the time they were fixed at Bremen until after the return there subsequent to the second stranding (R. 264-5). This witness, called by the respondent, was cross examined by the respondent and by the Commissioner in an effort to break him down in this connection; his testimony on this issue appears on pages 263-5, 269-73, 283-4 of the record. Testimony could hardly be more clear and definite, however, that the rudder had not been in contact with anything after sailing from Bremen. The witness testified (R. 273):

> "Q. It would not show in the screws if the rudder had been struck? A. *It would show in the*

screws if the rudder had been struck, yes, it would show.

Q. Then, if the rudder had been struck, the screws would show it? A. *The screws would show it, yes.*

Q. *And the screws didn't show it?* A. No."

On re-direct examination he testified (R. 280):

"Q. The captain has testified that before you came on the bridge, the stern of the 'Isis' touched the bottom. If the lashings were strong enough to hold, and if the quadrant screw was tight enough to hold, how could you tell whether or not the rudder had touched something? A. The rudder can't move, *something would be gone if the rudder had touched the ground.*"

(R. 280-1):

"Q. And as I understand your testimony on cross examination, when you examined the screws on the quadrant, before you started up the river back to Bremen, you saw no paint off? A. No.

Q. And no sign that the quadrant had been moved? A. No, nothing.

Q. All you did was to look at the quadrant, and that is what you saw? A. Yes."

(R. 283):

"Q. Did you examine the lines to this rudder after the second stranding? A. What—the rudder?

Q. Yes, the wire cables that you had down to your rudder—did you examine them after the second stranding? A. Yes, they were not touched.

Q. They had not been touched? A. They had not been touched.

Q. Were not strained in any way?

Mr. Haight: Stretched—pulled out—loose.

A. No, absolutely tight.

Q. They had not been affected in any way? A. No."

This witness testified that he was the one who made fast the lines from the rudder to the bitts, and his testimony is most convincing as to the careful examination he made of the lines and of the quadrant after the second stranding. He unequivocally testified that "something would be gone if the rudder had touched the ground"; and he also testified that nothing was gone.

The libellant's experts testified that if, while lashed, the rudder hit hard enough to be bent, as it was found after the second stranding, the lines would have loosened or given way, or the shackle or ring on the rudder would have been broken. The fact of the impact would be clearly apparent in the condition of the lines (R. 331, 340-2, 356, 370-1).

The respondent's expert, Captain Davis, testified (R. 406):

> "Q. If you have your rudder quadrant fixed with two screws or one screw—there seems to be a difference in the evidence whether it was one screw or two—do you not agree with me that if you have any such impact that it would show in any such screws—is that not so? A. I can't—I would have to see how it was secured to answer that question intelligently, to be sure of my answer.
>
> Q. In any event, the man that fixed it and saw it both before and after the second stranding is in the best position to express an opinion on that, is he not? A. Yes, I should think so."

We have quoted the testimony of the chief officer who made the rudder fast, that any impact was bound to show in the quadrant brake and lashings.

Respondent's counsel argued below that up to the time that the ship turned to starboard to give passage-way to the ascending vessel, no difficulty was experienced in controlling the vessel. They stressed the maneuver book and the pencil markings on the chart as to the ship's position

at various times. As the Commissioner pointed out, however (R. 513), no dependence can be placed on these markings, as the times marked on the chart were merely estimates taken from the maneuver book. After having made these estimates as best he could from the maneuver book, it seems unusual, to say the least, to attempt to compare the movements shown in the maneuver book with the bends appearing on the chart.

The master's testimony establishes that the "Isis" was turned to starboard at about kilometer 16 when an ascending vessel was seen approaching around the bend at Vegesack (R. 98). The testimony also establishes that this vessel was successfully passed a little above kilometer 17 (R. 65). It will be noted that kilometer 17 is about four-tenths of a mile, or 2400 feet, above the buoy at the intersection of the Lesum with the Weser. It is established by the master's testimony that the difficulty in steering the ship was encountered before the "Isis" was affected by the current at the Lesum. The master testified that the difficulty of breaking the sheer to starboard was noticed long before the episode of touching aft to which he had referred (R. 112).

So far as concerns the master's testimony that no difficulty in steering the ship was encountered prior to passing the ascending ship, it is, we submit, of importance to examine the master's testimony before the Board of Marine Inspectors, or "Seeamt", at Bremerhaven. He there testified as follows in relation to the voyage down the Weser River from Bremen (R. 459):

> "In the beginning, everything went smoothly. The commands were called out to the tugs. We then passed two dredging machines and afterwards a small steamer. As we were sailing in the middle of the channel, I told the pilot that it would be better to leave some more room for passing. We

thereupon went over a little to the starboard side, but later we held on again to the middle of the channel. In the meantime, the engines were going steadily. *The vessel, however, did not come back to port, but had the tendency to shear to starboard.*"

It is true that the record is not a verbatim stenographic report of the testimony of the witness, and it is also true that the master denied that he testified as quoted. However, the report of the Board, contains the following (R. 473):

"According to the statements of several witnesses, *particularly according to the declarations of Captain Krueger, the vessel tended, during the entire passage, to swing toward starboard although the maneuvers of the two tugs were supported by the engines of the 'Isis'. The speed was moderate.* According to the statement of the chief engineer Fuhrman supported by the abstract of the engine log book submitted, the port engine had to go astern much more frequently than the starboard engine and this tends to confirm the statements of the witness that the vessel tended to swing to starboard."

The respondent's witness, Wulirmann, was a member of the Board (R. 199). *He testified that the statements made in the findings which he signed, are true* (R. 199-200, 204, 207, 287).

We submit that the master's statements, made immediately after the stranding, before a Board appointed to examine into the cause of the stranding, are entitled to considerably more weight than the master's testimony taken over two years later, at a time when the respondent's interests required that a different position be taken. His statements before the Board are admissions binding on the respondent.

The Potomac, 8 Wall. 590, 594;

The Lisbonense, 53 Fed. 293, 301 (C. C. A. 2nd Circ.);
The W. Talbot Dodge, 15 F. (2d) 459, 460 (S. D. N. Y.);
The Fanwood, 61 Fed. 523, 525 (S. D. N. Y.);
The Bellota, 57 F. (2d) 264, 5 (S. D. N. Y.);
The Enterprise, 8 Fed. Cas. #4497 at p. 731.

The respondent has heretofore stressed the chief officer's testimony that he noted no difficulty in steering while he was on deck. However, the ship did not start down the river until about 2:15 A. M. (R. 267), and he went to his room and to sleep at 2:30 A. M. (R. 267). At the time of the examination of this witness before the Marine Board at Bremerhaven, he testified (R. 461-2):

> "During this trip, I was on the bridge until about 2:30 o'clock. It surprised me that the 'Hoheweg' could not hold the bow of the 'Isis', I did not see the accident happen * * *."

The witness agreed that all his testimony before the Board was true except the statement about the difficulty with the "Hoheweg" (R. 276-7).

We submit that it is a strange coincidence that the records of the Marine Board should be correct in every particular except its record that both the master and the chief officer testified to difficulty in steering the "Isis". Of course the chief officer knew nothing about the difficulties after he went to sleep, but we submit that the chief officer's testimony at Bremerhaven establishes that even before he left the bridge at 2:30, the tugs were having difficulty in keeping the "Isis" from sheering.

It was the master whom the Commissioner found testified untruthfully in relation to the dangerous condition of the rudder. We submit that no known legal principle justifies a finding that, although admittedly he had little regard for the truth when expressing his opinion about

the rudder, he was truthful when he said that he did not testify before the Seeamt as the written record of that court shows; a record which another of the respondent's witnesses, who sat as a member of the court, testified was correct (R. 199-200, 204, 207, 287).

In this connection it is to be noted that the respondent chose to bring to New York and examine the chief officer in an effort to bolster up the master, although he was on deck for only a few minutes after the ship sailed from Bremen, and was sound asleep from then until after the second stranding. The second officer who was on the bridge with the master (R. 122), was not called as a witness. He was the one in a position to support the master's testimony, if it could be supported. The damaging inference to be drawn from the omission to call the second officer is, we think, clear.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 80.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

REPLY BRIEF FOR PETITIONERS.

D. ROGER ENGLAR,
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INDEX.

PAGE

I. Answer to respondent's argument as to the interpretation of Section 3 of the Harter Act (U. S. C. Title 46, Section 192)..... 1

II. Reply to respondent's argument on the facts..... 7
(a) The Alleged Negligence of the Pilot..... 7
(b) The Bent Rudder..... 8

Appendix i

TABLE OF CASES CITED:

Louis-Dreyfus & Co. v. *Paterson Steamships, Ltd.* (opinion not as yet reported; a copy is attached as an appendix to this brief)..... 1, i

Steamship Willdomino v. *Citro Chemical Co.*, 272 U. S. 718..... 13

Wilderoft, The, 201 U. S. 378, 388, 9..... 8

STATUTES CITED:

Harter Act (Act of February 13th, 1893; U. S. C. Title 46, Section 192)..... 1, 2, 3, 4, 5, 6

Limitation Act (Act of March 3rd, 1851; U. S. C. Title 46, Section 183)..... 3

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I.

Answer to respondent's argument as to the interpretation of Section 3 of the Harter Act (U. S. C. Title 46, Section 192).

Since our principal brief was filed, the Circuit Court of Appeals for the Second Circuit has filed an opinion which is peculiarly interesting in connection with the present case. This opinion was rendered in the case of *Louis-Dreyfus & Co.* v. *Paterson Steamships, Ltd.* As the decision is not yet reported, we attach a copy as an appendix to this brief.

We quote from the *Louis-Dreyfus* case as follows:

> "L. HAND, *Circuit Judge*: This case now comes before us after a second trial following our decision reported in 43 Fed. (2) 824. * * * Since our opinion this court has decided the case of *May* v. *Hamburg*,

63 Fed. (2) 248, and held, or at least intended to lay down, that section three of the Harter Act excused faults of navigation, if the owner used due diligence to make the ship seaworthy as to all that could have contributed to the damage; but that seaworthiness irrelevant to the loss was not a condition precedent to the excuse. The question had, perhaps, been unsettled in this court, and although *all of us now sitting are of another mind*, we will follow *May* v. *Hamburg*, until the Supreme Court, which now has the case before it on certiorari, settles the point." (Italics ours.)

The above quotation affords a striking illustration of the sharp difference of opinion among the judges of this circuit, as to the proper interpretation of Section 3 of the Harter Act.

* * * * * * * * * * *

The respondent's argument fails to distinguish between cases dealing with negligent navigation and cases dealing with unseaworthiness or other excepted causes. For this reason many of its citations are wholly irrelevant. As we pointed out in our principal brief, a shipowner's exemption in respect of unseaworthiness is in no way dependent on the Harter Act. Even before that Act was passed, a shipowner could legally contract for exemption from damage due to latent defects or other unseaworthiness not resulting from any negligence on his part. Such a contractual exemption, of course, would not be invalidated by other unseaworthiness which was due to negligence, but which did not contribute to the loss. The same is true of various other exceptions which were valid at common law, as, for example, against perils of the sea. It was only in respect of the negligence of himself and his servants that the carrier could not contract for exemption at common law; and it is only in cases involving such negligence

that the condition of the third section of the Harter Act becomes important. Citation of cases dealing with the Limitation Act (U. S. C. Title 46, Section 183), and cases of damage resulting from unseaworthiness and perils of the sea, only tend to confuse the issue.

A similar confusion of thought pervades the respondent's argument that the construction for which the petitioners contend would lead to absurd and illogical results. It will scarcely be suggested that there was anything absurd or illogical about the law of this country as it stood for a hundred years before the Harter Act was passed; and yet the law is precisely the same today where the condition of Section 3 of the Harter Act has not been fulfilled. Respondent's whole argument on this point reads as though the liability asserted by the petitioners were imposed by the Harter Act. If this were true, there might be some force in the respondent's argument. As pointed out in our principal brief, however, the true situation is entirely different; the respondent's liability arises under the general maritime law, from the negligence of its servants. As to such negligence, a common carrier cannot exempt himself except by compliance with Section 3 of the Harter Act; and in the absence of such compliance, the carrier is in precisely the same position as though the Act had never been passed.

We submit that there is nothing arbitrary or harsh in the construction for which the petitioner contends. By the third section of the Harter Act, Congress confers a valuable privilege upon shipowners. This privilege is conditional, but the condition is neither harsh nor unreasonable. On the contrary, it lays down a rule which is eminently fair and easily fulfilled. The respondent's discussion of trifling defects is beside the point. A vessel may have trifling defects and still be seaworthy. Moreover, she is not even required to be seaworthy; the only requirement is that the owner use due diligence to make her seaworthy. Certainly,

this would appear to be a sufficiently liberal standard of conduct; but it does not satisfy the respondent. The respondent's position is that it must have the option to comply with the condition or not as it sees fit; taking its chances as to whether or not its negligence happens to cause any damage. The lack of diligence may not cause any damage; or if it does, that fact may never become known. We submit that the fallacy of such an argument is apparent. Congress has, in effect, divided shipowners into two classes. Shipowners may, if they choose, ignore the Harter Act. If they do, the Act imposes no additional burden on them, but leaves them exactly where they were before the Act was passed. On the other hand, shipowners may, if they see fit, enter a privileged class by complying with the condifions set forth in the Act. Thereupon they become entitled to certain immunities which they could not obtain otherwise. We submit, however, that there is no middle ground. The language of the Act makes it clear that only by using due diligence to make the ship *"in all respects"* seaworthy, can the owner claim the immunity which it confers.

The Harter Act establishes a standard of conduct. Violation of that standard does not carry with it any penalty, but merely the withholding of a privilege. In this respect the terms of the Act are extremely mild. One who drives an automobile sixty miles an hour is subject to a fine, and possible imprisonment, notwithstanding his action may have been entirely harmless. He is punished not because he has done any harm, but because such punishment is deemed the most effective way of enforcing a standard of care. He may do harm next time; or some less skillful driver may do harm by going at the same speed. If the State or some civic association offered a gratuity to all motorists who never exceeded thirty miles per hour, it would scarcely be suggested that this gratuity could be

claimed by a motorist who frequently exceeded the stipulated speed, on the ground that he had never caused any damage.

The effects of bad conduct and bad example are imponderable. A careless attitude on the part of the owner may well affect the attitude of the crew. In this case it was known that the steering gear of the "Isis" was seriously damaged. She was sailed hurriedly at night, without a thorough examination of her rudder, which was known to be at an angle of 45° to the upper end of the stock. The man who was to give her a certificate of seaworthiness had not even seen her; but it is claimed that he would have issued a certificate the following day. All of this was arranged by the marine superintendent and not by the master. The master testified as follows (R. 129):

> "A. My boss, Captain Reichenbacher, he told me, 'I fixed it up with the seaworthy part, with Mr. Julicker,' and took it over to Hamburg. He was going to train to Hamburg.
>
> Q. Captain Reichenbacher was going to Hamburg? A. Yes, this was 7 o'clock at night.
>
> Q. And the certificate was to be sent where? A. He said he is going to fix it up with Mr. Julicker, and he is taking the seaworthy certificate along with him to Hamburg, so I shouldn't worry about that."

The only finding on the subject is that due diligence was not used in the examination made. Certainly the atmosphere in which the vessel sailed was not conducive to the highest care on the part of anyone concerned. Congress may have had such considerations in mind in framing the third section of the Harter Act. Whether it did or not we submit that it expressed itself clearly, and it is not the function of the courts to rewrite the statute.

In arguing that Section 3 of the Harter Act has no application to the acts of the owner in an intermediate port, the respondent says (at p. 48):

> "The Act makes its requirements as of the time and place when the ship breaks ground. It cannot, by judicial construction, be made to repeat those requirements at other times and places."

The respondent cites no authority for this statement; nor does it point to any language of the Act which tends to sustain its argument. On the contrary, the third section of the Harter Act provides in the most general terms for the exercise of due diligence by the owner. Ordinarily, of course, no duty rests upon the owner excepting at the original port of shipment; everything which is done later is within the scope of the duties ordinarily delegated to the master. Wherever the owner does intervene, however, and assumes any duty affecting the seaworthiness of the vessel, he falls squarely within the language of Section 3 of the Harter Act. "Judicial construction" is required not to bring such acts within Section 3, but to exclude them from the operation of that Section. The respondent apparently concedes that if, at the beginning of the voyage, it is known that something will be required at an intermediate port to keep the vessel seaworthy, the owner is bound to supply this need under pain of forfeiting his protection under Section 3 of the Harter Act. It argues, however, that the same rule does not apply if the need arises at an intermediate port, even if the owner himself intervenes and undertakes to decide what shall be done. We know of no basis for such a distinction and it certainly finds no support in the language of the Harter Act.

II.

Reply to respondent's argument on the facts.

(a) *The Alleged Negligence of the Pilot.*

In Appendix A to its brief, the respondent discusses at very considerable length the errors of the deceased pilot. It appears that the pilot was not guilty of a single momentary lapse of skill or judgment, but committed a whole series of gross errors. To use the respondent's own expression (Appendix, p. iii):

> "The entire maneuver was bungled."

Moreover, the same pilot was in command of the "Isis" at the time of the first stranding while she was bound up the river to Bremen (R. 161). As stated by the Commissioner:

> "It is not disputed that this stranding was caused by negligence in navigation" (R. 503).

Such conspicuous lack of skill as the pilot is said to have displayed in the present case, inevitably suggests doubt as to his general competence to direct the navigation of the flotilla under his command. One would naturally expect that the proof of his bad judgment and lack of skill in the present case would be coupled with very full proof of his previous successful experience in directing the navigation of crippled vessels assisted by tug boats, down the Weser River at night. The record is silent, however, on this very important point. It does not appear that the pilot had ever participated in the navigation of a disabled vessel, excepting when the "Isis" was brought up to Bremen after the first stranding. That trip was begun and largely completed in daylight; the vessel was assisted by *fire* tugs;

and it does not appear what, if any, part the pilot took in directing the movements of this flotilla after the stranding. Moreover, the logbook states that:

> "Even for these five towboats it was very difficult to hold the ship in the channel and the ship's own machinery had to be used in addition right along because of the heavy sheering of the ship toward starboard and because the steering engine motor commenced to get warm, it was assumed that the rudder stock was damaged" (R. 482).

Apparently, the pilot was selected to take the "Isis" out largely because of his experience in bringing her in (R. 161), on which occasion she stranded and sustained serious damage through his negligence. Apart from this there is no evidence as to the pilot's qualifications for navigating a flotilla of this character, excepting the statement of respondent's marine superintendent that he was "a very experienced pilot" (R. 161).

We submit that the absence of proof on this vital issue, as to which the respondent has the burden, is fatal to respondent's case. *The Wildcroft*, 201 U. S. 378, 388-9.

(b) *The Bent Rudder.*

It is significant that respondent finds it necessary, in numerous instances, to disregard the findings of the Courts below, and devotes a large part of its brief to the discussion of evidence.

As to the examination made after the first stranding, we quote as follows from the Commissioner's Report (R. 522):

> "None of the witnesses found this distortion when the vessel was drydocked at Bremen the first time, but it is clear from the evidence of the respondent's

witnesses that the examination which was made might not, and probably would not, have revealed it. (Exhibit 13, Asmus, 113-114.)"*

On the question whether the bent rudder contributed to the second stranding, there is certainly no finding below that it did not physically contribute to some extent. The extent of its effect would, of course, depend upon the speed of the vessel, and it is significant that one of the faults charged against the pilot is proceeding at excessive speed. Even more significant is the respondent's allegation that the speed of the flotilla just before the stranding was greater than the average speed had been up to that time (Respondent's Brief, Appendix A, p. 1). If it be true that the speed of the "Isis" was increased just before the accident, the effect of her bent rudder would likewise be increased. It must be borne in mind that neither the pilot nor anyone else on the "Isis" knew that the rudder was bent. They had been proceeding at very slow speeds and may not have observed its effect. Even a slight increase in speed may have exaggerated the effect of the bent rudder sufficiently to bring about disaster.

The respondent suggests that the finding of the Seeamt, that the "Isis" tended to sheer to starboard, refers to her trip up the river after her first stranding, and not to her trip down the river prior to the second stranding. In answer to this suggestion we quote as follows from the report of the Seeamt (which is not analogous to our Local Inspectors, but is a Court of Admiralty,—R. 468):

> "In judging all the facts of the case, it must be borne in mind that the *steering capacity of the entire flotilla was naturally curtailed* firstly because there was relatively little water under the keel and then because the four vessels connected with each

* (The references to the present record are 246-7.)

other formed a unit and developed only a slow speed. *Furthermore during the passage from Bremen to Vegesack the SS 'Isis' evidently tended to swing to starboard.* The reason for this has not been quite found beyond all objection. Apparently the master did not notice this swinging to starboard because the bend of the fairway was at first in the same direction, Witness Capt. Zey, master of the tug 'Eversand' has testified that he did not at all notice this swinging to starboard of the SS 'Isis'. The Admiralty Court does not connect this swinging of the vessel with the fact that later, when docking the vessel, it was found that the back pieces of the rudder stood a few degrees to starboard. As it appears from the testimony of witnesses that the SS 'Isis' left the dock of the Weser Company Ltd. with the rudder well secured and standing amidships, it is to be supposed that the twist in the rudder was caused only through the grounding at Vegesack.

* * * * * * * *

"No fault attaches to the Master for this accident, either. *It must be attributed to* the coincidence of several unfavorable circumstances—*limited steering capacity* of the vessel, strong wind coming almost from athwart and an exceptionally strong tide current running against the vessel at an unfavorable site" (R. 478-9). (Italics ours.)

From the foregoing quotations it is apparent that the Seeamt found that the "Isis" *did* tend to sheer to starboard while proceeding down the river to Vegesack. It was unable to explain this tendency to sheer because, on the evidence before it, the Court assumed that the bend in the rudder blade occurred at the time of the second stranding. It is clear from its opinion that if it had had before it the evidence submitted to the Commissioner, which showed

that the rudder blade was bent at the time of the first stranding, the Seeamt would have found in this fact a natural and sufficient explanation of the otherwise unexplained tendency to swing to starboard.

We call attention also to the fact that the Seeamt considered that one of the important factors contributing to the disaster was the "limited steering capacity" of the flotilla. In this connection we refer to the testimony of the respondent's master and marine superintendent that, at the time in question, it was a difficult and hazardous matter even for a vessel in perfect condition to navigate the Weser. (R. 117, 168).

The decision below appears to have been based primarily upon the testimony of three experts who appeared before the Commissioner. One of these, Captain Davis, was undoubtedly a man of great skill and experience. We have no quarrel with his testimony, which is discussed in our principal brief (at pp. 40-43).

Huseby had never commanded a ship outside New York harbor, where his experience consisted in towing ships between different points in the harbor (R. 433-4). His only sea experience had been as a sailor before the mast and as a quarter-master (R. 434-5).

French, the third of the respondent's expert witnesses, had never had any sea experience at all (R. 377). He repeatedly pointed out that he was not a navigator and was not competent to express opinions on such subjects as were being discussed (R. 383, 385). However, French also testified as follows (R. 393):

> "Q. You will agree with me, will you not that even a 5 degree bend will have some effect on the navigation of the ship? A. I should say it would.
>
> Q. You have understood I have been talking about degrees? A. Yes.

> Q. You will agree that 5 degrees will have some effect on the navigation of the ship? A. It ought to have some effect."
>
> * * * * * * *

It appears, therefore, that at least two out of the respondent's three experts agreed that the bend in the rudder would have some effect on the navigation of the "Isis". Indeed, Davis quite frankly stated that it was desirable for the navigators of the vessel to know of the bend; and suggested that it would have been better not to lash the rudder at all, but to let it swing free (see our Principal Brief, p. 42). When this testimony is considered in connection with the testimony of the respondent's master and marine superintendent that they would not have sailed the vessel if they had known of the bend in the rudder, it can readily be seen why the respondent could not obtain a finding in the lower courts that the bent rudder had no effect on the steering of the "Isis".

Respondent cites the case of a vessel which was navigated for a considerable period with a bent rudder without the bend being noticed. This is entirely possible. Vessels are not steered by placing the steering wheel in any particular predetermined position in order to bring about any desired change of course. Steering is an entirely practical process. The quartermaster turns the wheel one way or the other as required to keep the vessel on the desired course. Thus, he automatically and unconsciously counteracts the effect of a bend in the rudder. The situation is entirely different, however, when the rudder is lashed amidships. As Captain Davis so well said, if the existence of the bend were known

> "the rudder could be secured in such a position that the effect would be neutral" (R. 400-1).

This is quite true; but where, as here, the bend was not known, and the rudder was lashed amidships, the effect of the bend was not neutral, but positive.

Respectfully submitted.

D. ROGER ENGLAR,
T. CATESBY JONES,
HENRY N. LONGLEY,
Counsel for Petitioners.

NOTE: In the table of cases at the beginning of our principal brief, we neglected to give the citation of *The Willdomino* in this Court. We desire to add that citation at this time. *Steamship Willdomino* v. *Citro Chemical Co.*, 272 U. S. 718.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

LOUIS LOUIS-DREYFUS and CHARLES LOUIS-DREYFUS, doing business under the firm name and style of Louis-Dreyfus & Co.,

Appellants.

—against—

PATERSON STEAMSHIPS, LTD.,

Appellee.

Before—L. HAND, SWAN and MACK, *Circuit Judges.*

Appeal from a decree in the admiralty of the District Court for the Western District of New York dismissing a libel *in personam* for cargo damages.

BIGHAM, ENGLAR, JONES & HOUSTON and BURKE & DESMOND (Henry N. Longley, Thomas C. Burke, and Ezra G. Benedict Fox, of counsel), proctors for the appellants.

HOLDING, DUNCAN & LECKIE (Frederick L. Leckie, of counsel), proctors for the appellee.

L. HAND, *Circuit Judge*: This case now comes before us after a second trial following our decision reported in 43 Fed. (2) 824. The judge had originally dismissed the libel, and we should have sustained his decree except for some testimony that the pumps of the "Advance" were so rigged that the only suction in the cargo hold was from a pump in the engine room. Two expert witnesses had said that

this made the ship unseaworthy, and the respondent had not contradicted their testimony. We felt bound, therefore, to allow this issue to be tried. The parties interpreted our words a little more broadly than we intended, and the evidence on the second trial was directed not only to the pumps, but to the bulkheads and valves in general. At the conclusion of the proof, the judge found the ship seaworthy as to all these, and again dismissed the libel. Since our opinion this court has decided the case of *May* v. *Hamburg*, 63 Fed. (2) 248, and held, or at least intended to lay down, that section three of the Harter Act excused faults of navigation, if the owner used due diligence to make the ship seaworthy as to all that could have contributed to the damage; but that seaworthiness irrelevant to the loss was not a condition precedent to the excuse. The question had perhaps been unsettled in this court, and although all of us now sitting are of another mind, we will follow *May* v. *Hamburg*, until the Supreme Court, which now has the case before it on certiorari, settles the point. Had the pumps been actually out of repair, the damage might have resulted from their neglect. But this was not true; they were all set in motion and could not control the leak. They were not, as the engineer supposed, in fact rigged so that the engine pump alone sucked the cargo hold. And for that matter that pump continued to work until the ship was tied up, and it became apparent that the leak was too great to be kept down. Any leak in the bulkheads served at once to protect the grain from the water entering the cargo hold, and to allow the suctions in the forepeak and the engine room to assist. Thus, if *May* v. *Hamburg* be right, the libellant loses.

We might rest the case on this, but should that decision be reversed, we should have to decide as to the general seaworthiness of the ship, and as we think that the respondent has carried the burden of proof on that issue anyway, we can finally dispose of the suit now.

As we have said, there were suctions to the cargo hold operated directly from the boilers. Indeed, the libellant does not appear to dispute this; if it does, its position is clearly untenable. It does insist, however, that there is no proof that the pumps were in good condition, or that the bulkheads were proper. As to the pumps, two of the libellant's witnesses had inspected her in the spring of 1927, a few months before the strand; one, only at that time. While their attention was not specifically directed to the pumps, still they found them in good condition. Three years later, during which she had been out of commission, one of these witnesses reexamined her and three more for the first time. They said that the pumps appeared to be still in sound shape. The libellant called two witnesses: one of these had examined the "Advance" shortly after she went ashore, though not with this point in mind, and both reexamined her three years later. They found the pumps in bad condition, and thought that the defects had existed when the ship broke ground. The question is one on which we must accept the decision of the judge who saw the witnesses, even if there had been no testimony that after the strand all the pumps worked properly.

A more difficult question arises from the condition of the bulkheads. There were two of these; one at the forward end of the cargo hold, which made a forepeak, the other separating the cargo hold from the engine room. When the ship was examined in 1930 it was found that these had separated along the skin of the ship, in some cases as much as six inches, so as not to be water-tight. Whether this condition existed when the ship broke ground, is left in some doubt, but, as the respondent has the burden, we will assume *arguendo* that it did. There was a dispute whether in a wooden ship iron bulkheads can be made water-tight; but even if they cannot, it does not follow that such wide cracks are tolerable. We think that bulkheads in such

condition as we assume these to have been, would be unseaworthy, if more than cargo partitions were necessary at all. Upon that issue the experts also disagreed; the libellant's insisting that water-tight bulkheads were necessary; the respondent's saying that in a "composite" ship like the "Advance", they were not. Though there were no statutory or administrative rules requiring such ships to be so equipped when used in Lake travel, those in the "Advance" must have been originally intended to be more nearly tight than they later became. However, this is irrelevant, if the law imposed upon the owner no duty to have anything but cargo partitions. The ship was seaworthy if she conformed to the requirements of her class and service, even though her owner failed to keep her up to a higher standard which he had gratuitously assumed. *The British King*, 89 Fed. Rep. 872, affirmed on opinion below, 92 Fed. Rep. 1018 (C. C. A. 2). It is true that two of the respondent's witnesses testified on cross examination that if there were bulkheads, they should be kept as tight as possible. Possibly they meant that they would not pass her otherwise, though they did not expressly say so. But in any case they repeatedly said that there was no need of water-tight bulkheads, and we cannot read their testimony as a whole to mean that the "Advance", even with her bulkheads leaking, was unfit for her service. Of course a ship with compartments is safer than one without: especially is this true of the forepeak where collisions are most likely. Probably this was the only bulkhead important in the "Advance", which could scarcely have lived with either her cargo hold or her engine room flooded. But owners are not obliged to construct ships of the highest safety; seaworthiness is a resultant of the added safety from the supposed device and its cost; ordinarily it depends upon the standard generally accepted in the trade for which the ship is used, though certainly in the end the court sets the standard. *The T. J. Hooper*, 60 Fed. (2) 738, 740 (C. C. A. 2). There does not seem

to us occasion here to advance beyond the accepted requirements. With passenger ships it might well be different, but here we have a question of property alone. Moreover, the Lakes are not like the high seas. "Composite" vessels, like wooden ones, had by 1927 been generally displaced by steel on the Lakes; but they were still passed to carry cargo, as they had done for many decades before, notwithstanding the absence of any water-tight compartments. We are not prepared in this instance to overrule the opinion of the calling, and say in effect that such ships must be retired.

The libellant finally argues that the "Advance" was unseaworthy, because her chief engineer did not know that she had suctions leading from the cargo hold to pumps harnessed directly to the boilers. *The Elkton*, 49 Fed. (2) 700 (C. C. A. 2). He so swore and probably so understood in August, 1927, though his testimony was given eighteen months after the accident. The second engineer was properly advised in any event, and would probably have undeceived his chief, had he failed to start all pumps. But quite aside from this, the point is ill taken anyway. The theory back of the doctrine is that the ship's sufficiency depends not only on her gear, but on the presence of a crew so informed as to be able to handle it; and it seems to us extravagant to suppose that in an emergency a master or an engineer would not start all the pumps available. This was especially the case in the "Advance" which had limbers through the bulkheads. Indeed, the event proved the truth of this, for all pumps were started after the strand. Therefore, even if the engineer did not know the actual rigging of his pumps, his ignorance was not a vital element in the general competence of the personnel on board.

It does not seem to us necessary to discuss the other points raised. We see no ground to upset the conclusions of the judge upon the sharply contested issues before him.

Decree affirmed.

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Supreme Court of the United States

October Term 1932

No. [redacted] 80

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN W. GRIFFIN,
WHARTON POOR,
Counsel for Respondent.

INDEX.

PAGE

Statement..... 1

I. The causes of action on which petitioner seeks recovery are governed by German law and petitoner shows no right to recover under that law..... 5

II. The *Isis* was fit for the trip from Bremen to Hamburg..... 9

III. Even if it be assumed that the *Isis* was unseaworthy on sailing from Bremen, the petitioner could not recover..... 13

(1) Seaworthiness on sailing from the loading ports satisfies both the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause..... 13

(2) If the vessel is seaworthy on sailing, her owners are not liable for faults or errors in management or navigation, making the vessel unseaworthy at sea, at ports of call, or at the port of discharge. 14

(3) When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the navigation or management of the vessel for which the shipowner is not liable..... 15

(4) When the fault or error (if it existed) was not the cause of the loss, it is perfectly obvious that it must be disregarded..... 16

PAGE

(5) Alleged "intervention" of respondent... 16

(6) Petitioner's authorities..... 18

IV. Causal connection under the Harter Act..... 20

V. The petition for a writ of certiorari should be denied..... 24

TABLE OF CASES.

Atchison, etc. Ry. Co. v. Calhoun, 213 U. S. 1..... 16

Bank of California v. International Mercantile Marine Co., 64 Fed. (2d) 97..... 8
Bradford Electric Light Co. v. Clapper, 286 U. S. 145.... 7
Brick v. Long Island R. R. Co., 245 N. Y. 222..... 11

Caledonia, The, 157 U. S. 124..... 13
Carisbrook, The, 247 Fed. 583..... 14
Charter Shipping Co. v. Bowring, 281 U. S. 515..... 6
Cuba Railroad Co. v. Crosby, 222 U. S. 473..... 7

East River Co., In re, 266 U. S. 355..... 18

Guadaloupe, The, 92 Fed. 670.....15, 17

Hartford & N. Y. Tr. Co. v. Rogers & Hubbard, 47 Fed. (2d) 189, 283 U. S. 835..... 23
Holy Trinity Church v. United States, 143 U. S. 457.... 21

Indrani, The, 177 Fed. 941..... 15
International Navigation Co. v. Farr, 181 U. S. 218...14, 18

Jason, The, 225 U. S. 32..... 5
Jay Wai Nam v. Anglo-Am. Co., 202 Fed. 822..... 15

PAGE

McCaldin v. Cargo of Lumber, 198 Fed. 328, affd. 202 Fed. 735. 11
Malcolm Baxter, Jr., 277 U. S. 233. . . . . 22, 23
Milwaukee Bridge, The, 26 Fed. (2d) 327. . . . . 15, 17

Newport, The, 7 Fed. (2d) 452. 14

Oritani, The, 40 Fed. (2d) 522, affd. 54 Fed. (2d) 1075. . 14

Silvia, The, 171 U. S. 462. 14
Smyrna, The, 62 Fed. (2d) 1048. 11
Standard Oil Co. v. United States, 221 U. S. 1. 21
Steel Navigator, The, 23 Fed. (2d) 590. . . . . 14, 15, 21
Styria, The, 186 U. S. 1. 16

Thessaloniki, The, 267 Fed. 67. 22
Titania, The, 19 Fed. 101. 11
Turret Crown, The, 282 Fed. 354; 284 Fed. 439. 22

United States v. N. Y. & O. S. S. Co., 216 Fed. 61. . . . . 15, 17

Valentine, The, 131 Fed. 322. 20

Waalhaven, The, 36 Fed. (2d) 1706. 20
Wildcroft, The, 201 U. S. 378. 15
Willdomino, The, 300 Fed. 5, affd. 272 U. S. 718. . . . . 18, 19

TEXT BOOKS.

Carver, Carriage by Sea, 7th Ed. 11, 13, 15

STATUTES.

Fire Statute, R. S. 4282. 18
General Limitation Statute, R. S. 4283. 18
Harter Act (Feb. 13, 1893). 13-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 983.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,
Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,
Respondent.

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

The libelant, as assignee of cargo owners, sued to recover back sums deposited with the respondent to secure general average contributions. The libel alleged that these deposits were obtained by duress (Record, p. 7), but no proof of duress was offered. Concededly, the deposits were made in accordance with the usual maritime practice.

Some further statement of the facts and some correction of the petitioner's statement seem necessary to a right understanding of the case.

In December, 1927, the respondent's cargo steamer *Isis* loaded, at certain Pacific Coast ports, cargo destined for Bremen, Hamburg and other ports.

When the *Isis* sailed from her loading ports, she was seaworthy, and properly manned, equipped and supplied. Both the District Court (p. 690) and the Circuit Court of Appeals (pp. 706, 707, 710) so found; and the petitioner admits it (Petition, p. 2).

Therefore, on sailing, the *Isis* and the respondent had fully complied with the Harter Act and with the Jason clause of the bill of lading (see authorities, *infra,* pp. 13, 14).

Just before the *Isis* arrived at Bremen, and while she was proceeding up the Weser, she stranded and twisted her rudder stock about 45°, with the result that, when the vessel's helm was put amidships, her rudder was over to starboard. This was the only damage suffered. With the assistance of tugs, the *Isis* reached Bremen without further incident and there discharged the cargo destined for that port. The petitioner makes no claim with respect to this occurrence, saying (Petition, p. 3):

> "Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding."

When the *Isis* had discharged her Bremen cargo the practical situation was this:

It would have been possible to put the *Isis* into dry dock and to make permanent repairs. This would have required about two weeks' time (Record, p. 211), and necessitated handling the greater part of the several thousands of tons of cargo, destined for Hamburg and other ports, which was still on board. This cargo would have had to be discharged, stored, insured and reloaded (Record, p. 217). The expense of all this would have constituted a general average charge on ship and cargo; and, because of the relative values of ship and cargo, four-fifths of the expense would have fallen on the cargo.

The only suitable dry dock was already engaged for an indefinite period (p. 217). Therefore several weeks' delay would have been involved.

The other alternative was to send the ship on the short run from Bremen to Hamburg with her rudder lashed amidships and with the assistance of tugs for steering purposes.

Before any decision was reached, the vessel's rudder blade was examined by a diver, who made four descents (p. 118) and reported that it was in good condition. In order to make this certain, the *Isis* was placed in a dry dock which was available for a few hours for purposes of examination, though not for the much longer time needed for repairs. Since she still had a large quantity of cargo on board, the water could not be pumped completely out of the dry dock, and about one-quarter of the rudder blade (3 to 4 feet) remained submerged. In this situation, she was examined (not at night, as stated by the petitioner, but between 5 and 6 P. M.), not only by her master, but by four other surveyors, including the respondent's marine superintendent, an inspector and two repair men, who went in a small boat close up to her rudder. Down to the water line the rudder was, of course, visible throughout. They examined the small part below the water with a light and also by hand and by applying to the rudder blade a straight edge, which is the standard method of test (p. 368). Not the slightest bending of the rudder blade was discovered.

The surveyors recommended that the vessel proceed to Hamburg with her rudder lashed and with tugs to assist in her steering. She had, of course, the full power of her engines available, and she had twin screws, which gave considerable steering capacity. She had tugs which, the experts' evidence showed, gave her, at moderate speeds, greater steering capacity than her rudder would have done (Davis, p. 495; Huseby, pp. 525, 526; Krueger, p. 104; Commissioner's Report, pp. 656, 657).

In addition, the respondent consulted the head surveyor of Germanischer Lloyds, the German Classification Society, who approved her proceeding in this manner. The petitioner states that no certificate of seaworthiness was obtained. It is true that none was actually signed that evening, owing to the lateness of the hour, but the surveyor in question, upon

a statement of the case to him, did in fact give his approval of the fitness of the ship to proceed under the circumstances stated, and subsequently gave a certificate to that effect (Exhibit 5, p. 617).

Besides all this, those underwriters who were within reach were consulted, namely, the Hamburg Underwriters Association, whose members insured all of the hull and a considerable part of the cargo (pp. 310, 181). They also approved, provided that the vessel had two tugs (p. 181).

The rudder was accordingly lashed amidships and not two, but three, tugs were engaged. These tugs were very powerful, aggregating 2,690 horsepower, more than that of the engines of the *Isis* herself (p. 89).

The *Isis* started down the river at about 1.30 A. M., under the direction of a river pilot, with the three tugs and, of course, the use of her own engines and twin screws. The chief pilot recommended starting at this hour because the tide was right and traffic at a minimum (p. 205). The river was abundantly lighted on both banks (p. 272), and it was a clear moonlight night.

It will be seen from the foregoing that the petitioner's assumption that the respondent knowingly sent out an unseaworthy ship is quite erroneous. In fact, the ship was entirely fit for the trip (pp. 9-12, *infra*), and the decision to send her and thereby to save the general average expenses, which would have fallen chiefly on cargo, and to avoid a long delay, was made after an unusually careful examination and after approval had been secured from the surveyors, from the chief surveyor of Germanischer Lloyds and from all of the underwriters who could be reached. There was certainly no lack of diligence.

The reason for the decision was "to save time and to save expenses and to do the best for everybody" (Reichenbacher, p. 218); "to save the cost of discharging the cargo, storing and reloading it, and in order to avoid the cargo being damaged by those manipulations" (Warns, p. 309). It was a decision made for the benefit of all the interests involved (Brandt, p. 185).

The vessel proceeded without difficulty for about an hour and forty minutes (pp. 105, 602), covering some 16 kilometers and rounding, without the slightest difficulty, bends in the river both to right and to left.

Just before she reached the point where the River Lesum enters the Weser, she sighted another steamer upbound. In order to pass, the pilot altered the course of the *Isis* to starboard and brought his vessel unnecessarily close to the starboard bank of the river. The result was, as the experts testified and the Courts below found, that she smelt the bank, and consequently swung to starboard. This in turn exposed her port bow to the flood tide, which was setting up the river, and that increased the starboard swing, with the result that she ran aground. General average expenses were incurred, in floating her, bringing her back to port, handling cargo, etc., to secure which the deposits now in suit were made.

This accident was due to an error in navigation on the part of the pilot, as was found by the Commissioner and by both the Courts below; and therefore, by the terms of the Jason clause (quoted p. 708 of the record), the shipowner is entitled to general average contribution. *The Jason*, 225 U. S. 32.

I.

The causes of action on which petitioner seeks recovery are governed by German law and petitioner shows no right to recover under that law.

At pages 15 and 16 of the petition, the petitioner states that his right to recover general average deposits was "dependent upon the same principles which would govern his right to recover damage to the cargo."

This is incorrect. The petitioner is not suing for damage to cargo, but to recover deposits which his assignors made as security for any contributions which might be found due by them in an adjustment of general average. And it is well settled, of course, that in such a case the law governing is

that of Germany (the law of the port of destination and, incidentally, the jurisdiction in which the accident happened) and the petitioner has not shown any right to recover under that law.*

In *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, suit, as here, was brought against shipowners to recover a general average deposit made in London, the voyage involved being from Gulf and Atlantic ports to London. This Court held that the right of the shipowner to contribution in general average, and hence the right of the cargo owner to the recovery of the deposit, was governed by English law, and that the District Court correctly exercised its discretion in refusing to take jurisdiction, the parties to the suit being aliens. As to the law governing, this Court said (pp. 517, 518):

> "As that liability" [in general average] "arises not from contract but from participation in the common venture, see *Hobson* v. *Lord*, 92 U. S. 397; *Barnard* v. *Adams*, 10 How. 270, 303; *The Roanoke*, 59 Fed. 161, 163; *Milburn* v. *Jamaica Fruit &c. Co.* (1900), 2 Q. B. 540, 550, its extent in the absence of such limiting clauses" [the Jason clause, etc.] "is, under the admiralty rule, fixed by the law of the port of destination. *Hobson* v. *Lord, supra*, 411; *Mousen* v. *Amsinck*, 166 Fed. 817, 820; *Compagnie Francaise de Navigation a vapeur* v. *Bonnase*, 15 F. (2d) 202, 203; Congdon, General Average (2d Ed.) 148. Even if so limited, the extent and effect of the limitation cannot be determined apart from consideration of the rule limited."

In the case at bar, the bills of lading incorporate the so-called Jason clause and provide that the carrier shall be entitled to avail itself of the Harter Act, except the bills for a small quantity of cargo shipped at Punta Arenas, and those contain a clause equivalent to the Jason clause (pp. 709, 710). Subject to possible qualification by reason of those bill of lading clauses, the German law governs and creates the right of action, if any.

---

* Some small portions of the cargo were destined ultimately for Antwerp and for London. This obviously does not affect the legal situation, save that the laws of Belgium and of England, as well as those of Germany, might have to be considered.

Since German law determines the petitioner's right to recover, questions of so-called public policy are not involved. If the petitioner cannot recover these deposits under German law, our courts will not create a right of action for his benefit, when none existed *ab initio*. As said by this Court in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, at 160:

> "A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done. Compare *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, 550, 551; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389; *Royal Arcanum* v. *Green*, 237 U. S. 531. See also *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542; *Atchison, T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 69."

The burden of proving that he has a cause of action under German law rests, of course, upon the petitioner; and he has not sustained that burden. There is neither allegation nor proof on the subject.

In *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, where the plaintiff sought to enforce a cause of action arising under the law of Cuba, this Court, per Mr. Justice Holmes, said (p. 478):

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done

and the parties are at the time of doing it. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. See *Bean* v. *Morris*, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights."

And at page 479:

> "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it."

In *Bank of California* v. *International Mercantile Marine Co.*, 64 Fed. (2d) 97 (C. C. A., 2nd Cir.), the steamship company, a common carrier, misdelivered certain goods consigned to the plaintiff at Hamburg. The defense to the action was that, under the bills of lading and as a condition of recovery, notice of loss was required to be given within a limited period. This condition was not complied with.

In holding that no recovery could be had, the Court said (p. 98):

> "The question therefore is whether the claim, since the misdelivery of the goods creating the claim was in Germany, is lost by the failure to give notice of claim as required by the bill of lading and whether the appellant is released, by reason of this agreement, from paying damages for the loss of the salmon. This liability depends upon the law of Germany. Louis-Dreyfus v. Paterson S. S. Co., 43 F. (2d) 824 (C. C. A. 2). German law is also determinative of the question of whether the cargo owner was excused by the conduct of the carrier in misdelivery from service of the notice of claim under the terms of the bill of lading. The place of performance of the obligation to be excused, that is, notice of claim, is the same as the place of the acts alleged to constitute the excuse, that is, misdelivery, and is governed by the law of the place of performance. Coghlan v. South Carolina R. R. Co., 142 U. S. 101, 111; Scudder v. Union Natl. Bank, 91 U. S. 408, 413; Louis-Dreyfus v. Paterson, supra; Wharton on Conflict of Laws (3d Ed.), §427, pp. 929, 930.

> The appellee did not offer any proof of the German law supporting the claim that a misdelivery excused the giving of notice of claim or the performance of any of the other terms of the bill of lading. In the absence of such proof, we may not indulge in the assumption that such is the German law. Gerli & Co. v. Cunard S. S. Co., 48 F. (2d) 115, 117 (C. C. A. 2). We may assume that the notice of claim and limitation of liability clauses in the bill of lading are in full effect."

II.

The *Isis* was fit for the trip from Bremen to Hamburg.

The petitioner frequently refers to the *Isis* as unseaworthy. In fact, she was found to be seaworthy. By consent of the parties, the issues were referred to Mark W. Maclay, Esq., an experienced member of the admiralty bar, as Special Commissioner. After hearings and argument he filed a very full report (Record, pp. 624-674), to which he annexed findings of fact and conclusions of law—among others that the *Isis* "was seaworthy for the intended voyage" (from Bremen to Hamburg) "in tow of the tugs described with her rudder lashed amidships" (p. 672). The petitioner's exception to this finding was overruled by the District Court (pp. 687, 688), which approved the finding. This agrees with the finding made by the German Seeamt, or Court of Inquiry, whose report was offered in evidence by the petitioner and which found (p. 593):

> "There should have been no hesitation in starting the voyage with a vessel so equipped and aided."

It is not believed that the Circuit Court of Appeals took a different view. While the opinion does refer to the vessel as "crippled" and as "unseaworthy," it is evident that, in those parts of the opinion, the Court is considering the vessel *per se* and unaided by tugs. The Court does not criticize or overrule the concurrent finding of the Commissioner and of the District Court that the vessel, assisted by tugs, was

fit for the trip? On the contrary, the Circuit Court of Appeals said (pp. 711, 712):

> "Was the ship seaworthy when it left for Hamburg? Seaworthiness, a relative term, depends upon the circumstances surrounding each undertaking. A vessel under tow may be regarded as seaworthy if the tugs are powerful enough to tow the vessel, even though she is not navigated under her own power.*
>
> * * * The captain and mate of the vessel and the captain of the towboats testified that there was no difficulty experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, and in so doing they navigated through several bends in the channel in both directions. * * * If there were a bend in the rudder, the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. As the vessel proceeded before the stranding, the three tugs were found below to have been going full speed ahead. But, as found below, the power of the vessel and her tugs was employed to correct any tendency to sheer, which would affect the navigation or control of the vessel."

And at page 710 the Circuit Court of Appeals said:

> "The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

The petition does not assert that the *Isis* was unseaworthy, except in that

> "her rudder * * * was bent so that, even with the rudder lashed amidships her course would be erratic and she could not make such a voyage safely while being steered by tugs" (Petition, p. 3).

Criticism is also made because she sailed at night (Petition, p. 3).

The petitioner's charges are easily answered:

(1) The rudder blade was not bent when the vessel sailed from Bremen. This is shown by the examination made by

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* The *Isis* was in fact navigated under her own power.

the diver and by the subsequent examination made in dry dock. After the vessel returned, following the *second* stranding, a very slight deflection of the tip of the rudder blade was found, amounting only to 5°. It is altogether probable that this was done at the time when her stern struck bottom just before she stranded the second time (pp. 95, 108, 137).

(2) The deflection in question was not of the slightest practical consequence. The evidence of the experts (pp. 502, 557) showed that, before the steering of the vessel would be substantially affected, the whole of her rudder blade would have to be bent nearly, if not quite, 10° (pp. 481, 557). The deflection in question, which was observed only after the *second* stranding, affected only about 20% of the rudder's surface, amounting to a maximum of 5° at the extreme tip and diminishing to zero about halfway up and halfway forward (pp. 298, 306). Over this 20% there was, therefore, an average deflection of 2½°. This is equivalent to a deflection of the entire rudder blade to the extent of *one-half of 1°*, a microscopic figure, wholly without the smallest possibility of practical effect.

It was found by the Special Commissioner (p. 657), by the District Court (pp. 687, 688) and by the Circuit Court of Appeals (p. 713) that, even if the deflection in question had existed when the *Isis* left Bremen, it could have had no effect upon her steering. The expert testimony appears at pages 469, 477, 502 and 555. As the Courts below point out, this is confirmed by the fact that there was no trouble in handling the ship from the time she left Bremen until the scene of the accident was reached (pp. 102, 331).

(3) If the deflection existed, it was, therefore, wholly immaterial, and an immaterial defect does not make a vessel unseaworthy.

The Smyrna, 62 Fed. (2d) 1048; C. C. A., 4th Cir.;
McCaldin v. *Cargo of Lumber*, 198 Fed. 328, affirmed 202 Fed. 735; C. C. A., 3rd Cir.;
The Titania, 19 Fed. 101, 107;
Carver, Carriage by Sea, 7th Ed., Sec. 17;
Brick v. *Long Island R. R.*, 245 N. Y. 222.

(4) It can hardly be claimed that sailing at night constituted unseaworthiness. As already pointed out, the river was well lighted, the weather fine, the tide right, and traffic at a minimum, and the time of departure was fixed in accordance with the opinion of the chief pilot of the port of Bremen.

As regards the fitness of the vessel, therefore, after the most thorough examination possible, she was considered by all of those who were consulted, including underwriters, to be fit to proceed. It was good judgment to have her proceed rather than to incur the long delay and the certainty of heavy general average expenses that a different course would have involved. In fact, the only effect of the accident at the Lesum was to subject the cargo to general average charges similar to those which would have been incurred if she had been repaired at Bremen. This demonstrates the triviality of the complaint made. The Commissioner and the District Court, as well as the German Tribunal, specifically found her fit to proceed, and the opinion of the Circuit Court of Appeals, when rightly understood, is not to a different effect.

Therefore the whole basis of the petitioner's argument fails. The petition practically charges the respondent with having, for its own convenience and quite recklessly, sent out a vessel known to be unseaworthy. In fact, she sailed only after careful examination and with the unanimous approval of everyone, in order to save delay and expense, which would have fallen chiefly on the cargo.

These being the facts, it is submitted that the questions of law stated in the petitioner's brief do not arise. Not only is it improbable that the minute deflection of the rudder blade was present when the *Isis* left Bremen, but it is certain that, if it were present, it did not affect her fitness nor her navigation, and it is equally certain, as found by the Commissioner and by both Courts below, that it had nothing to do with the accident, but that the accident was the result of negligent navigation on the part of the pilot.

III.

Even if it be assumed that the *Isis* was unseaworthy on sailing from Bremen, the petitioner could not recover.

The petitioner considers (Petition, pp. 15, 16) that this case depends upon the same principles as would a suit for damage to cargo. This may be assumed for purposes of the argument under this point.

(1) *Seaworthiness on sailing from the loading ports satisfies both the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause.*

In *The Caledonia*, 157 U. S. 124, this Court, quoting from an opinion of Mr. Justice Brown, when Circuit Judge, said (p. 133):

> "The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point *up to which the warranty of seaworthiness extends.*" (Italics ours.)

In *Carver on Carriage by Sea*, 7th Ed., Sec. 21, it is said:

> "The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one; viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing.
>
> On the other hand, there is no undertaking that she will continue fit after sailing. If from any cause she afterwards becomes unseaworthy, and this leads to loss, the shipowner is only liable if the cause was one for which he was answerable."

That this is the rule with respect to the Harter Act is, of course, elementary.

In *International Navigation Co.* v. *Farr*, 181 U. S. 218, this Court, in speaking of the obligation under the Harter Act to make the ship seaworthy, said (p. 225):

> "* * * that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment *before* the commencement of the voyage and *until it is actually commenced.*"

And at page 226:

> "The obligation was to use diligence to make her seaworthy *before she started on her voyage,* * * *."

In The Steel Navigator, 23 Fed. (2d) 590; C. C. A., 2nd Cir., the Court said (pp. 591, 592):

> "The covenant of seaworthiness is to be determined when the ship breaks ground and only then. * * * Especially is it necessary to remember that the measure of what can in any event be demanded of her is her fitness for the whole voyage as contemplated at the outset. Adjustments made necessary by subsequent events pertain to her management, and cannot touch her seaworthiness."

The Newport, 7 Fed. (2d) 452, 454; C. C. A., 9th Cir.;

The Oritani, 40 Fed. (2d) 522, affd. 54 Fed. (2d) 1075; C. C. A., 3rd Cir.

(2) *If the vessel is seaworthy on sailing, her owners are not liable for faults or errors in management or navigation, making the vessel unseaworthy at sea, at ports of call, or at the port of discharge.*

(a) *At sea:*

The Silvia, 171 U. S. 462, where the crew failed to close iron shutters, resulting in damage to cargo by sea water;

The Carisbrook, 247 Fed. 583; C. C. A., 1st Cir.

(b) *At ports of call:*

The Steel Navigator, 23 Fed. (2d) 590; C. C. A., 2nd Cir.;
Jay Wai Nam v. *Anglo-Am. Co.*, 202 Fed. 822; C. C. A., 9th Cir.;
The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, 216 Fed. 61; C. C. A., 2nd Cir.;
The Milwaukee Bridge, 26 Fed. (2d) 327; C. C. A., 2nd Cir.

(c) *At ports of discharge:*

The Wildcroft, 201 U. S. 378;
The Indrani, 177 Fed. 941; C. C. A., 2nd Cir.

(3) *When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the navigation or management of the vessel for which the shipowner is not liable.*

The above proposition is directly supported by the decisions in

The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, C. C. A., 2nd Cir.; 216 Fed. 61;
The Milwaukee Bridge, C. C. A., 2nd Cir.; 26 Fed. (2d) 327.

Those decisions are correct in principle, and there is no decision in any other circuit at variance with them. They govern the case at bar.

From what has been said, it is beyond question (1) that the statutory duty as to seaworthiness enjoined by the Harter Act is completely fulfilled if the ship is seaworthy when she leaves her loading port; (2) that if she subsequently becomes unseaworthy, at sea or in a port of call, that fact does not deprive her of the protection of the Harter Act.

(4) *When the fault or error (if it existed) was not the cause of the loss, it is perfectly obvious that it must be disregarded.*

Atchison etc. Ry. Co. v. *Calhoun*, 213 U. S. 1.
See discussion, p. 23.

(5) *Alleged "intervention" of respondent.*

The petition (p. 10) states that the second question presented is—

> "Where a shipowner *intervenes* and *personally orders* a vessel to sail from an intermediate port *knowing her to be unseaworthy*, can he obtain exemption under the third section of the Harter Act by virtue of his previous compliance with that Act at the original port of shipment?" (Italics ours.)

The discussion already had shown that the underlying assumptions of this question are entirely erroneous in fact.

At page 31 of the petition is advanced the proposition that "where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call, and * * * causes her to sail in an unseaworthy condition, he can obtain no exemption under section 3 of the Harter Act." It cannot fairly be said in the present case that the shipowner "intervened" and personally ordered the *Isis* to sail. All that the respondent did was to have its marine superintendent hold a survey and consult with the master. There was no "intervention" in any improper sense. The captain was not overruled, as the petitioner seems to imply. It was the opinion of all the practical men at Bremen, including the captain (pp. 89, 90), that it was proper for the *Isis* to proceed with her rudder lashed and with the assistance of three powerful tugs. As already stated, the Courts below and the German Tribunal found her in fact fit. Certainly it should be the policy of the law to encourage a shipowner to assist the master, rather than to condemn his assistance as intervention. In *The Styria*, 186 U. S. 1, an Austrian vessel, just after the outbreak of the Spanish-American War, had loaded sulphur at an Italian port for delivery in the United States.

Believing that sulphur had been declared contraband by Spain, the master relanded it and sailed. When his vessel arrived in the United States she was sued by the owners of the sulphur, who alleged that, in relanding it, the master had failed properly to exercise his discretion, and had merely blindly followed his owner's positive orders. In rejecting this contention this Court said (p. 20):

> "Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. * * * So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. In the case of *Nobel's Explosives Co.* v. *Jenkins* (L. R. 1896, 2 Q. B. 326), just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners,* if it were possible to get it before the emergency was over; and all that can be said is, that there was a *concurrence of judgment* between the ship agents and the master as to what was the proper course to pursue." (Italics ours.)

That was precisely the situation here; the master and the marine superintendent consulted and concurred in judgment.

No one disputes that, if the decision in the present case had been made by the master without any consultation, the exemptions of the Harter Act would have applied.

The Guadaloupe, 92 Fed. 670;
United States v. *N. Y. & Q. S. S. Co.*, C. C. A., 2nd Cir.; 216 Fed. 61, 71, 72;
The Milwaukee Bridge, C. C. A., 2nd; 26 Fed. (2d) 327.

It follows that the duty of taking such measures at an intermediate port does not fall within the requirements of the Harter Act; for, if it did, it would be a non-delegable duty and negligence even of the master would destroy the owner's defense under the Harter Act. Such matters are matters of management, and their *nature* is not changed by the fact that they are performed by one person or by another. As was said by this Court in *International Co.* v. *Farr,* 181 U. S. 218, at 226, in speaking of the Harter Act:

> "* * * The law recognizes no distinction founded on the character of the servants employed. * * *"

Section 3 of the Harter Act provides that, if the owner shall have exercised due diligence, etc.; he shall not be liable for faults or errors in management or navigation. The petitioner seeks to add to the Act the further proviso, "* * * unless the fault or error is that of the owner's marine superintendent." But there is no such qualification. The exemption is complete. It would be judicial legislation to insert such an exemption, especially as the Harter Act does make certain specific requirements of the owners. To add others is quite beyond the functions of the Court (*In re East River Co.,* 266 U. S. 355).

On the other hand, the Fire Statute, R. S. 4282, and the General Limitation Act, R. S. 4283, do distinguish between the acts of the owner and those of his employees. While, therefore, Congress has specifically provided in those two statutes that the owner is not entitled to their benefit, if personally at fault, there is no similar proviso in the Harter Act as regards anything happening after the ship has sailed from her loading port.

(6) *Petitioner's authorities.*

The cases relied on by the petitioner are quite different in their facts and are not in conflict with the foregoing.

In particular, the petitioner claims that *The Willdomino,* 300 Fed. 5 (C. C. A., 3rd Cir.), affirmed 272 U. S. 718, is in conflict with the decision below. But the distinction is very plain.

The *Willdomino* was a case of a "voyage in stages," i. e., it was a case where the Court applied the rule that, if a vessel is to proceed from her loading port to a port of call, and thence to her destination, she need not, at first setting out, be seaworthy for the *entire* voyage, but only for the first stage, *provided, however,* that at her port of call she is made seaworthy for the balance of the voyage; but, if this is not done, she is unseaworthy *ab initio* (*Carver, Carriage by Sea,* 7th Ed., Sec. 19-b). In the *Willdomino* the vessel sailed from Messina for New York, via Gibraltar and Lisbon. On leaving Messina she had not enough coal to take her to New York, and that deficiency was not remedied at the ports of call. She left Lisbon for New York with insufficient coal. Consequently she was forced to deviate to Nova Scotia and there stranded. Clearly she never complied with the Harter Act at all; for she did not remedy her deficiency at the ports of call and was therefore unseaworthy *ab initio.* The Circuit Court of Appeals in the present case was absolutely correct in saying that "in the Willdomino case, the fault arose at the inception of the voyage."

In the Circuit Court of Appeals for the Third Circuit the *Willdomino* was decided (1) on the ground that the vessel was unseaworthy; (2) on the ground that she deviated. This Court affirmed on the ground of deviation, without considering the other point.

The wide difference between the *Willdomino* and the present case is shown by the fact that, while the *Willdomino* was unseaworthy as to coal supply at *all* her loading ports, the *Isis* was *admittedly seaworthy* at those ports. The *Willdomino* was only *conditionally* seaworthy on sailing from Messina, i. e., if she loaded sufficient bunkers at the ports of call to see her through. But, when her owners failed to perform this obligation, she was unseaworthy *from the beginning.* Therefore she did not fulfill her warranty of seaworthiness, nor did she comply with the Harter Act. Neither the decision of the Circuit Court of Appeals nor that of this Court is relevant in the case at bar.

The Waalhaven, 36 Fed. (2d) 1706, was a case of deviation, and clearly not in point here. The Court, however, recognizes the rule that damage not proximately resulting from unseaworthiness is to be disregarded, saying:

> "We regard the damage suffered in Cabot Strait as not a proximate result of her unseaworthiness. The Malcolm Baxter, Jr., 277 U. S. 323."

In *The Valentine,* 131 Fed. 322 (a District Court decision), where the cargo of a steam lighter was damaged because the lighter was sunk at her pier by ice, while her officers were ashore, her fires banked and her pumps not working, the Court decided against the owners on the ground of initial unseaworthiness or rather of improper manning. The owners of the vessel knew from the beginning that the captain and engineer would go ashore, and that all equipment for avoiding injury would be useless. The Court said:

> "* * * if the owners approve, suffer or connive at such custom or practice, such vessel is not properly manned."

The Court further said:

> "The loss in the present case arose from fault in the management of the vessel at Pier 42 (where she was tied up), *but the fault was not initiated there.*" (Italics ours.)

These cases have no bearing on the present situation.

IV.

Causal connection under the Harter Act.

The petitioner finally suggests that the case involves the question of whether, if the vessel is unseaworthy in some detail, the protection of the Harter Act is forfeited, although that unseaworthiness has nothing to do with the disaster. However interesting that question may be, it does not arise in the present case. The vessel was seaworthy throughout

when she left her loading ports, and, as was said in *The Steel Navigator*, C. C. A., 2nd Cir.; 23 Fed. (2d) 591, 592:

> "The covenant of seaworthiness is to be determined when the ship breaks ground and only then. * * * Adjustments made necessary by subsequent events pertain to her management and cannot touch her seaworthiness."

The question is in reality this: If a vessel sails from her loading ports having fully complied with the Harter Act, and if, at an intermediate port, her master, after consultation with the owner's marine superintendent, does some act which technically affects her seaworthiness, manning or equipment (such as removing her radio set, withdrawing a man from her crew, or permitting her to proceed with some slack rivets in her deck), and if thereafter she is struck by lightning or strands through the negligent navigation of her master, is the protection of the Harter Act destroyed by the technical unseaworthiness, in spite of the fact that she was entirely seaworthy at the only time when the Harter Act required her to be so, and in spite of the fact that the subsequent technical unseaworthiness had not the remotest connection with the disaster? To state the question is to answer it.

It should, nevertheless, be pointed out that the Harter Act, like other statutes, must be construed reasonably, and not so as to produce an absurd result.

> *Holy Trinity Church* v. *United States*, 143 U. S. 457;
> *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The Special Commissioner expressed it well when he said (pp. 651, 652):

> "Dictates of convenience as well as reasonable and fair construction are opposed to a rule which, if followed to its logical conclusion, would require the shipowner, in case of damage to cargo by unseaworthiness of a plate in the No. 1 hold or in case of a general average sacrifice due to admittedly negligent navigation, to show that the vessel was seaworthy not only

> in respect of her No. 1 plating in the one case or of her navigating equipment in the other case, but also in respect of every single part of hull and machinery and of deck, engine-room and steward's equipment, or that due diligence had been exercised in that behalf. The possibility of permitting the shipowner to escape from a liability for, or to recover a general average contribution in spite of, some point of seaworthiness, which never results in any damage to anyone, is surely neither unjust nor fraught with any practical danger."

If the rule contended for by the libelants were correct, then, in every case where the Harter Act is pleaded as a defense, it would not be enough to prove that the ship was seaworthy in respect to everything connected with the disaster, but the shipowner would have to show that he had what does not exist—a ship perfect in every detail of design, construction, manning, equipment and supply. If the cargo, by meticulous cross-examination, could show that there was any particular, no matter how utterly unconnected with the disaster, in which the ship, her manning or her supply, was open to criticism, the defense of the Harter Act would be invalidated. Indeed, the burden would be on the shipowner to show that every conceivable detail was perfect, or that due diligence had been used. As a practical matter, such proof could never be given about any ship.

Surely no such preposterous result was intended by Congress or would be sustained by the Courts. The phrase "in all respects" in the Act means, of course, in all respects material to the case. It does not mean that there is to be a contest of wits between the parties as to whether the cargo interests can find any detail, wholly unconnected with the accident, which may be open to some criticism.

In this connection, it may be remarked that, in the *Malcolm Baxter, Jr.*, 277 U. S. 323, this Court cited with approval the following Harter Act cases which hold that unseaworthiness having no relation to the disaster is not material.

> *The Turret Crown*, 282 Fed. 354;
> *The Thessaloniki*, 267 Fed. 67; C. C. A., 2nd Cir;
> *The Turret Crown*, 284 Fed. 439, at 444, 445; C. C. A., 4th Cir.

In *Hartford & N. Y. Tr. Co.* v. *Rogers & Hubbard*, 47 Fed. (2d) 189, 192, the Circuit Court of Appeals for the Second Circuit squarely held that, if unseaworthiness had no connection with the accident, it was immaterial under the Harter Act. This Court declined to grant a writ of certiorari to review that question (283 U. S. 835).

The petitioner's whole contention rests on confusion of thought. The answer may be stated as follows:

It is too well settled for argument that the requirement of due diligence under the Harter Act speaks as of the time when the vessel breaks ground on her voyage; at that time it is either satisfied or not satisfied. In this case it was satisfied, and the shipowner was therefore entitled to the immunities given by the Harter Act. Assuming, for the sake of argument, that even respondent itself made an error of judgment or was guilty of negligence, in sending the *Isis* out from Bremen with the assistance of tugs, then either (1) that error was excused by the terms of the Harter Act as an error in management; or (2), if not excused, it would give rise merely to an independent claim for any damages caused by that error; and, since the Special Commissioner, the District Court and the Circuit Court of Appeals have all found that the accident was not caused by that error, but by the negligent navigation of the pilot, there could be no recovery. This Court has squarely held, in the *Malcolm Baxter, Jr.*, 277 U. S. 323, that unseaworthiness does not make a vessel liable for cargo damage unless the unseaworthiness caused the damage.

To put the matter in another way, so long as the requirement of the Harter Act was satisfied at the loading port, the immunities of the Harter Act applied to the voyage. Assuming that the respondents' servants at Bremen made an error and that, because of "owner's intervention" the consequences of the error were not within the cover of the Harter Act, still the protection of the Harter Act was lost *only quoad that error;* and, since that error had nothing to do with the accident, the whole question becomes academic. The accident was due to negligent navigation on the part of the pilot,

and the Harter Act certainly covers that. Whether it covers acts of the owner which did not cause the disaster makes no difference whatever.

V.

The petition for a writ of certiorari should be denied.

Dated, New York, June 5, 1933.

HAIGHT, SMITH, GRIFFIN & DEMING,
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New York City.

JOHN W. GRIFFIN,
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INDEX

PAGE

Statement of proceedings below 1

Statement of facts 2

Decisions in the Courts below 7

FIRST: The *Isis*, on sailing from her loading ports, was in all respects seaworthy, etc., and thereby satisfied the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause; and the respondent became entitled to their benefits. 10

1. Requirement of seaworthiness or due diligence relates to time of starting voyage 10
   (a) Cases on implied warranty 11
   (b) Cases under Harter Act and Jason clause. 13

2. If a vessel was seaworthy on starting her voyage, her owners are entitled to the benefits of the Harter Act and the Jason clause, even though subsequent faults or errors in management or navigation have made the vessel unseaworthy at sea, at ports of call, or at destination 14
   (a) At sea 14
   (b) At ports of call 15
   (c) At destination 15

3. When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the management of the vessel, for which the shipowner is not liable 16

SECOND: The stranding was due to the negligent navigation of the pilot 18

PAGE

THIRD: The *Isis* was in fact seaworthy and fit to proceed when she sailed from Bremen..... 19

1. The alleged bend in the rudder, if it existed, was immaterial, as found by both the Courts below.. 22

2. The rudder blade was carefully inspected before the *Isis* left Bremen and was found to be straight..... 23

3. The rudder was properly lashed and secured... 28

4. The *Isis* was in good condition to proceed and the tugs were of ample power..... 29

5. The navigation of the *Isis*, up to the time of the negligence which caused her stranding, proves that she was perfectly fit to proceed..... 32

FOURTH: The decision to send the *Isis* with tugs was a proper one..... 37

FIFTH: There was no "intervention" by the shipowner which made Section 3 of the Harter Act or the Jason clause inapplicable to the pilot's error in navigation.. 39

1. The facts do not show an intervention by the shipowner..... 39

2. Even if there had been intervention by the shipowner at the port of call, errors in management would still be within the Harter Act and the Jason clause..... 42

3. Intervention, if any, by the shipowner at the port of call did not affect the applicability of the Harter Act and the Jason clause to the pilot's error in navigation, which was the cause of the accident; but, at most, affected their applicability only to the shipowner's personal act and its direct consequences..... 43

PAGE

SIXTH: Unseaworthiness or lack of diligence in some detail having no causal relation to the accident does not affect the applicability of Section 3 of the Harter Act or of the Jason clause..... 49

1. The construction of Section 3 advocated by the petitioners would give absurd results and would in effect nullify the Act..... 50

2. A statute should not be construed so as to bring about unreasonable results if any other construction is possible..... 54

3. The better authority supports the respondent's contention..... 56

SEVENTH: The decree below should be affirmed..... 62

APPENDIX A.

The evidence fully supports the concurrent findings below that the stranding was caused by the pilot's negligent navigation..... I

APPENDIX B.

Translation of engine maneuver book..... V

APPENDIX C.

The alleged bend in the rudder blade had no effect on the navigation of the *Isis*..... VII

TABLE OF CASES

	PAGE
Annie Faxon, The, 75 Fed. 312	41
Bivins v. Lessee, etc., 15 Ga. 521	55
Bradley v. Fed. St. Nav. Co., 24 Lloyd's List Rep. 446; aff'd in House of Lords, 17 Asp. M. C. 265	21
Brick v. Long Island R. R. Co., 245 N. Y. 222	21
Caledonia, The, 157 U. S. 124	11
Carib Prince, The, 170 U. S. 655	18
Carisbrook, The, 247 Fed. 583	15
Christie v. Fane SS. Co., 159 Fed. 648 (Appendix)	IV
Church of the Holy Trinity, 143 U. S. 457	55
City of Birmingham, The, 138 Fed. 555 (Appendix)	IV
Compania la Flecha v. Brauer, 168 U. S. 104	18
Davis v. Schwartz, 155 U. S. 631	18
Earle & Stoddart v. Wilson Line, 287 U. S. 420	12
East River Co., In re, 266 U. S. 355	43
Edwin I. Morrison, The, 153 U. S. 199	11
Elder Dempster & Co. v. Patterson, 1924 App. Cas. 522	53
Elkton, The, 49 Fed. (2d) 700	47, 59
Elton, The, 83 Fed. 519	19
Eugene Vesta, The, 28 Fed. 762	11
Europa, The, 1908 Pr. D. 84	53
Fitzgerald, R. P., 212 Fed. 678	61
Francis Wright, The, 105 U. S. 381	44
Germanic, The, 196 U. S. 589	18
Guadaloupe, The, 92 Fed. 670	15, 16
Hamilton v. United States, 268 Fed. 15	21
Hartford & N. Y. Transp. Co. v. Rogers & Hubbard (The Spartan), 47 Fed. (2d) 189; cert. denied 283 U. S. 835	57, 58, 59, 61
Hawaii v. Mankichi, 190 U. S. 197	54
Heydenfeldt v. Davey Gold etc. Co., 93 U. S. 634	55
Holy Trinity Church v. United States, 143 U. S. 457	55

PAGE

Indien, The, 1933 Am. Mar. Cas. 1342 62
Indrani, The, 177 Fed. 914 ..... 16, 56
International Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218 ..... 13, 18, 56
Irrawaddy, The, 171 U. S. 187 ..... 11, 12

Jason, The, 225 U. S. 32 ..... 9, 10, 53
Jay Wai Nam v. Anglo-Am. Oil Co., 202 Fed. 822 15

Kish v. Taylor, 1912 App. Cas. 604 53

Louis-Dreyfus et al. v. Paterson, 43 Fed. (2d) 824 61

Malcolm Baxter, Jr., The, 277 U. S. 323 ..... 44, 53, 57, 59
Marlborough, The, 47 Fed. 667 20
McCaldin v. Cargo of Lumber, 198 Fed. 328; aff'd 202 Fed. 735 20
McFadden v. Blue Star Line, (1905) 1 K. B. 697 12
McGrady v. Terrell, 98 Tex. 427 55
McLanahan v. Univ. Ins. Co., 1 Pet. 170 21
Merklen v. Johnson & Higgins, 3 Fed. Supp. 897 61
Milwaukee Bridge, The, 26 Fed. (2d) 327 ..... 15, 16

Newport News, The, 199 Fed. 968 15

O'Donnell, In re, 26 Fed. 334 61
Oritani, The, 40 Fed. (2d) 522; aff'd 54 Fed. (2d) 1075. 47

Polynesien, The, 10 Pr. Div. 28 ..... (Appendix) IV

Quinlan v. Pew, 56 Fed. 111 41

R. Lenahan, Jr., The, 48 Fed. (2d) 110 61
R. P. Fitzgerald, 212 Fed. 678 61
River Meander, The, 209 Fed. 913 60
Rosenberg v. Atl. Transp. Co., 25 Fed. (2d) 739 59
Royal Mail St. Packet Co. v. Com. Lloyd Brasileiro, 50 Fed. (2d) 207; aff'd 55 Fed. (2d) 1082; cert. denied 287 U. S. 607 ..... (Appendix) III

Sagamore, The, 300 Fed. 701 21
Silvia, The, 171 U. S. 462 ..... 14, 20
Smythe v. Fiske, 23 Wall. 374 55
Southwark, The, 191 U. S. 1 ..... 11, 14

PAGE

Spartan, The, 47 Fed. (2d) 189; cert. denied 283 U. S. 835 ..... 57, 58, 59, 61
St. Paul, The, 277 Fed. 99 60
Steel Navigator, The, 23 Fed. (2d) 590 ..... 14, 15, 17, 48
Styria, The, 186 U. S. 1 40

Texas & Gulf SS. Co. v. Parker, 263 Fed. 864 47
Thessaloniki, The, 267 Fed. 67 58
Titania, The, 19 Fed. 101 21
Turret Crown, The, 282 Fed. 354; 284 Fed. 439; 297 Fed. 766 ..... 55, 57, 58

Union Insurance Co. v. Smith, 124 U. S. 405 44
United States v. Amer. Trad. Co., 66 Fed. (2d) 617 ... 48, 49
United States v. Katz, 271 U. S. 354 54
United States v. Kirby, 7 Wall. 482 55
United States v. N. Y. & O. S. S. Co., 216 Fed. 61 ..... 15, 16
United States v. Ryan, 284 U. S. 167 55

Valentine, The, 131 Fed. 352 ..... 45, 46
Vortigern, The, 1899 Pr. D. 140 12

Waalhaven, The, 36 Fed. (2d) 706 ..... 45, 46
Wildcroft, The, 201 U. S. 378 ..... 14, 15, 18, 58, 59, 62
Willdomino, The, 300 Fed. 5; aff'd 272 U. S. 718 ..... 17, 45, 46, 60

TEXT BOOKS

Carver, Carriage by Sea (7th Ed.) 12, 17

STATUTES

Fire Statute—R. S. 4282 42

General Limitation Statute—R. S. 4283 42

Harter Act (February 13, 1893) 9, 10, 13, 42, 49, 50, 51, 53, 54, 60

Supreme Court of the United States

OCTOBER TERM, 1933

No. 80

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,
Petitioners,
against
HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Proceedings Below.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The libels were filed to recover back certain sums deposited with the respondent by owners of cargo on the steamship *Isis*, as security for general average contributions. It was alleged by the petitioners (R. 5) that the deposits had been exacted by duress. No evidence of this was offered. It is now conceded that the deposits were made in accordance with the usual maritime practice. Since the suit was started, the general average adjustment (Exhibit 16) has been completed and the amount of the cargo's contribution has thus been fixed. The excess security has been refunded, with interest (Stipulation, R. 20).

By consent, the issues were referred to an experienced member of the Admiralty Bar as Commissioner, "to hear the evidence adduced by the respective parties and to report his conclusions thereon to the Court" (R. 49). He filed a careful report (R. 499 to 536; 57 Fed. [2d] 265), holding that the libelants (petitioners here) were not entitled to recover.

The District Court (Judge Coleman), after re-examining the entire case, confirmed the Commissioner's report. His opinion is at R. 544-546 (57 Fed. [2d] 265, at 282). Thereupon a final decree was entered dismissing the libels (R. 546).

The Circuit Court of Appeals affirmed this decree. Its opinion is at R. 555-564 (63 Fed. [2d] 248).

Statement of Facts.

The respondent desires to supplement and correct the petitioners' statement of facts, as follows:

On sailing from her loading ports, the *Isis* had fulfilled the conditions of Section 3 of the Harter Act, as well as the identical conditions of the bill of lading "Jason" clause, in that she was in all respects seaworthy and properly manned, equipped and supplied. This was found by both Courts below and is not disputed here.

While proceeding up the River Weser to Bremen, on February 6, 1928, the *Isis* was anchored because of fog and, some hours later, her stern was blown by a strong wind against the river bank. This twisted her rudder stock (the upright stem of the rudder above the rudder blade) about 45 degrees, with the result that, when her helm was put amidships, her rudder was over to starboard.

At first the precise character of the damage was not known, but, as the vessel proceeded up the river, assisted by tugs, it was noticed that, when the helm was amidships, she tended to go to starboard, as she naturally would. On arrival at Bremen, she discharged the cargo destined for that port.

The cargo interests admit liability to contribute in the general average growing out of this stranding.

After arrival at Bremen, it was ascertained that her rudder stock was twisted, as already described. The rudder itself was examined by a diver and found to be straight; but, by way of extra precaution, the vessel was placed on dry dock and the water was pumped down as far as could safely be done with cargo on board. In fact, it was pumped down so as to expose all but about 3½ feet of the rudder, which was some 18 feet high (see pp. 24-25, *infra*).

A careful inspection was then made, not only by the master, but by four other competent men. The rudder was found to be perfectly straight down to the water line, and the remaining 3½ feet were examined by hand and by searchlight and tested by applying a straight edge. This test showed the rudder to be straight throughout its entire length (pp. 24-25, *infra*).

A practical question was then presented, whether to discharge cargo at Bremen, to repair the rudder stock there, and then to reload the cargo, thus incurring considerable general average expenses; or to send the ship on to Hamburg, where nearly all of her remaining cargo was destined, with the assistance of tugs.

Economy in avoiding general average expenses was far more important to the cargo than to the owners of the *Isis*. The contributory value of the *Isis* was only $223,879, whereas that of the cargo was $924,996 (see General Average Adjustment, Exhibit 16). The owners of the *Isis* therefore would have paid only one-fifth of the general average expenses incurred in Bremen, if the cargo had been discharged and the ship repaired there; whereas, four-fifths would have fallen on the cargo.

The expense of repairing in Bremen, and the delay involved for the cargo, were obvious. No dock was then available and it was impossible to ascertain when one would be free (Reichenbacher, R. 172). The repairs themselves would have taken about two weeks (R. 166). All of the practical men who examined the ship considered that would have been necessary to discharge most of the cargo on board before it

would have been safe to pump the dock dry in order to effect repairs (R. 171-173, 382). This would have involved heavy expense for discharging, storing, reloading and insuring the cargo.

The master and the surveyors thought it best, in order to save time and to avoid these expenses, to lash the rudder amidships, to send the vessel from Bremen to Hamburg with the assistance of tugs, and to deliver the cargo before repairs were made. This course would avoid practically all delay to the cargo, and would effect some saving in expenses for the ship and four times as much saving for the cargo.

Before a decision was reached, however, the Hamburg Underwriters Association was consulted. Its members carried all of the hull insurance (Warns, R. 249) and a considerable part of the cargo insurance (R. 141-142, 146, 152). The facts were laid before the Association's Average Committee, in whose hands such matters rest and whom it is the practice in Hamburg to consult in such cases (Brandt, R. 143). The Average Committee approved of sending the *Isis* to Hamburg, assisted by *two* tugs (R. 141, 150). The cargo underwriters who are interested in the case at bar were not available for consultation and claim that they are not bound to follow the other underwriters, though the practice is for all underwriters to follow the decision of those who have been consulted (R. 142-143).

The Chief Surveyor of Germanischer Lloyds, the association in which the ship was classed, was also consulted and he gave his approval (R. 161). Since it was then late, he did not actually sign a certificate of seaworthiness, but agreed to do so the next day (R. 161, 169). The petitioners' contention that the ship sailed without a certificate of seaworthiness is, therefore, in reality incorrect.

Accordingly, it was decided to follow this course "to save time and to save expenses and to do the best for everybody" (Reichenbacher, R. 172; see pp. 37-39, *infra*).

The rudder was lashed firmly amidships and the rudder quadrant was screwed down so that the rudder was immovably fixed in that position. Not two, but three, tugs were engaged. They were very powerful, having an aggregate of

2,690 horsepower, more than the power of the ship's own engines. The *Isis* was a twin-screw vessel, and her engines were in perfect condition, so that she could navigate under her own power as usual, and she also had steering power from her twin screws. The tugs were made fast, one on each quarter and one ahead, and the evidence is that, with the tugs so secured, the *Isis* had better steering capacity than her own rudder would have given her (pp. 29-30, *infra*).

The hour of sailing was fixed by the Chief Pilot of the port of Bremen as about 1 A. M. on the night of February 9th-10th (R. 161). This time was selected by him because at night the traffic was less and because the tide was flood—giving, of course, the best steering conditions for going down the river. The river was abundantly lighted along both banks and the night in question was clear, with moonlight. The vessel was in charge of a river pilot, who has since died and whose testimony, therefore, could not be secured. This pilot was selected by the Chief Pilot. He was a man of great experience and was recommended by the Chief Pilot (R. 161). The masters of the tugs were very familiar with such work (R. 177). The petitioners are in error in saying (brief, p 49) that there was no evidence that the navigators were competent.

The *Isis* proceeded for a number of miles, rounding the curves of the river in both directions and passing a number of vessels, without the slightest difficulty in steering (pp. 32-33, *infra*). Somewhat above the point where the River Lesum enters the Weser on the starboard side, the *Isis* sighted, at a considerable distance down the river, another steamer coming up. Just above the mouth of the Lesum the river curves to port. Instead of waiting and passing the steamer in the straight reach of the river, as he could and should have done (Appendix A, p. III, *infra*), the pilot of the *Isis* kept going, met the other steamer at the curve, and, in order to pass, swung the *Isis* to her own starboard, bringing her close up to the bank of the river channel. The effect of this was two-fold. Because the river begins to bend to port at that point, the flood tide, setting up the river, caught the *Isis*

on the port bow (R. 66); also, she was thus brought too close to the starboard bank and "smelled" it. The result of these two circumstances was that her bow sheered to starboard and she got so near the bank on that side that the starboard tug was forced to cast off, thus depriving her of its steering power. She passed so close to the buoy near the mouth of the Lesum that her starboard propeller could not be used, for fear of entangling it with the buoy and its chain. Therefore, as she reached the confluence of the Weser and the Lesum, she encountered the force of the current setting up the Lesum on her port bow at a time when she was smelling the bank and when her starboard tug and her starboard propeller had been rendered useless. Under these conditions, the sheer could not be overcome, and the *Isis* stranded across the point of land separating the Lesum from the Weser. This necessitated the general average sacrifices now in question.

As the Commissioner and both courts below found, this accident was due solely to the negligent navigation of the pilot (Appendix A, pp. I-IV, *infra*).

Testimony was taken in Hamburg from the witnesses who had examined the *Isis* in drydock and from a number of other navigators familiar with the river, all of whom testified that the *Isis* was entirely fit to proceed, with the assistance of the tugs. Similar evidence was given by the master and the chief officer of the *Isis* and by experts who were examined by the respondent before the Commissioner (pp. 29-32, *infra*).

The petitioners offered in evidence the record (Exhibit A, R. 455) and the decision (Exhibit B, R. 468) of the Seeamt of Bremen, a body corresponding roughly to our Local Inspectors of Steam Vessels. The decision of the Seeamt was that the *Isis* was seaworthy and fit to proceed (p. 32, *infra*).

The petitioners called no witnesses, except three experts examined before the Commissioner.

The petitioners' case seems based chiefly on the evidence of a witness who said that, *after* the second stranding, a minute bend (to a maximum of 5 degrees) was discovered at the bottom corner or tip of the rudder. The petitioners

ask for a finding (1) that this bend was present *before* the ship left Bremen, in the face of the evidence of the surveyors, who said that it was not present at that time (pp. 23-28, *infra*); and (2) that this bend, if present, deprived the respondent of the benefit of the Harter Act and of the Jason clause, even though the Commissioner and both courts below have found that it was trifling, would not have affected the steering of the vessel and, even if present, had nothing to do with the accident (pp. 22-23, *infra*). It is hard to imagine a more technical contention.

Decisions in the Courts Below.

The Commissioner found:

1. That the *Isis* was seaworthy, etc., on sailing from her last loading port.

2. That the requirements of Section 3 of the Harter Act and of the Jason clause relate to the time of original sailing on the voyage and were fulfilled.

3. That the stranding was caused by an error in navigation by the pilot.

4. That, though the examination made at Bremen was not absolutely exhaustive, yet in fact the *Isis* was *not* unseaworthy on leaving Bremen.

5. That, even if the rudder of the *Isis* had a 5° bend at the lower corner when she left Bremen, that fact was immaterial, because it neither caused nor contributed to the accident.

6. That the *Isis* steered well while going down the river.

7. That the respondent was entitled to the benefits of the Harter Act and of the Jason clause.

The District Court confirmed these conclusions, broadening the first so as to include all of the loading ports. Its

opinion expressly found that the arrangement made for navigating the vessel to Hamburg "*was reasonably necessary in view of the conditions in Bremen; furthermore, it left the vessel seaworthy for the trip to Hamburg*" (R. 546; 57 Fed. [2d], at 283).

The Circuit Court of Appeals made the same findings, save, perhaps, in one respect. It spoke of the vessel as "unseaworthy" on leaving Bremen (R. 563). But it is submitted that the Court was referring merely to the obvious fact that a ship whose rudder is lashed is not fit to proceed *unassisted* —and did not mean that the *Isis*, provided with adequate facilities for steering by means of three tugs and her twin screws, was unfit or unseaworthy *to proceed in tow*. The opinion must be read as a whole. The Court said (R. 561):

"Was the ship seaworthy when it left for Hamburg? Seaworthiness, a relative term, depends upon the circumstances surrounding each undertaking. A vessel under tow may be regarded as seaworthy if the tugs are powerful enough to tow the vessel, even though she is not navigated under her own power.*

* * * The captain and mate of the vessel and the captain of the towboats testified that there was no difficulty experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, and, in so doing, they navigated through several bends in the channel in both directions. * * * If there were a bend in the rudder, the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. As the vessel proceeded before the stranding, the three tugs were found below to have been going full speed ahead. But, as found below, the power of the vessel and her tugs was employed" (ample?) "to correct any tendency to sheer, which would affect the navigation or control of the vessel."

And at R. 560, the Circuit Court of Appeals said:

"The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

---

* The *Isis* was, of course, navigating under her own power.

The Circuit Court of Appeals nowhere suggests that these tugs had not sufficient power, and there is no contradiction of the evidence that they had. The Court nowhere disapproves, or in terms overrules, the very definite findings of the Commissioner and of the District Court that the *Isis* with the tugs was seaworthy and fit to proceed in tow from Bremen to Hamburg; and the evidence is absolutely overwhelming to the effect that she was entirely fit and seaworthy for that trip (pp. 19-37, *infra*).

The assumption which underlies the petitioners' entire brief—that the *Isis* was unseaworthy to proceed in tow on leaving Bremen—is directly opposed to the finding of the Commissioner and of the District Court and cannot be accepted as a proper basis for argument.

If this Court concludes that the courts below differed on this point, it will, no doubt, re-examine the facts, and accordingly the evidence is summarized at pages 19-37, *infra*.

The case, therefore, is one where the ship, on sailing from her loading ports, had complied with the requirements of the Harter Act and of the Jason clause and where subsequently she encountered an accident because of negligent navigation. Under the express terms of Section 3 of the Harter Act, the respondent is not liable for errors in navigation and, under the terms of the Jason clause (Clause 7 of the Bill of Lading, R. 37), it is entitled to general average contributions growing out of a disaster produced by negligent navigation (*The Jason*, 225 U. S. 32). The Commissioner and both courts below have decided accordingly.

Attention should be called to an evident typographical error in the opinion of the Circuit Court of Appeals, near the bottom of page 563 of the record. The opinion reads:

"The *Isis* was fitted for the voyage, and it was not intended that she would proceed in stages, and, when she sailed *from* Bremen, the owner's warranty of seaworthiness was thereupon performed and discharged."

The word "from" in the foregoing should evidently read "for".

POINTS.

FIRST.

The *Isis*, on sailing from her loading ports, was in all respects seaworthy, etc., and thereby satisfied the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause; and the respondent became entitled to their benefits.

Section 3 of the Harter Act is quoted at page 8 of the petitioners' brief. The Jason clause in the bills of lading (Clause 7, R. 37) follows the language of that section.*

The history of this clause is stated, and its validity and efficacy are upheld, in the *Jason*, 225 U. S. 32. Obviously the scope of the Jason clause is, and is intended to be, coextensive with that of the Harter Act and its language is to be construed exactly as the identical language of Section 3 of the Harter Act is construed. Authorities on one are authorities on the other. The petitioners appear to be in accord with this view (brief, bottom p. 7 and p. 8).

1. Requirement of seaworthiness or due diligence relates to time of starting voyage.

There is an implied warranty of seaworthiness when a vessel, being a common carrier, breaks ground for the voyage at her loading port. Section 3 of the Harter Act in effect requires fulfillment of this implied warranty (or due diligence therein) as a condition of the immunities which that section gives. Under the implied warranty, under the Harter Act and under the Jason clause alike, the requirement is imposed *as of the time when the vessel breaks ground at her loading port or ports.*

---

* A somewhat different form of Jason clause appears in the bill of lading for a small quantity of cargo shipped from Punta Arenas (R. 30). Both Courts below held that this form was legally equivalent to the form used in the remaining bills of lading (R. 509, 535, 546, 559) and the petitioners have not asked for a review of this ruling.

(a) *Cases on Implied Warranty.*

In the *Edwin I. Morrison*, 153 U. S. 199, 210, this Court approved the opinion of Mr. Justice Gray, sitting on circuit, in the *Caledonia*, 43 Fed. 681, 685, as follows:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy *at the time of beginning her voyage.* * * * The warranty is absolute that the ship is or shall be in fact seaworthy *at that time.* * * *" (Italics ours.)

When the *Caledonia* reached this Court (157 U. S. 124, 130), the foregoing was repeated and the Court said:

"We see no reason to doubt the correctness of the rule thus enunciated."

And at page 133, the Court continued (quoting from Mr. Justice, then District Judge, Brown in the *Eugene Vesta*, 28 Fed. 762, 763):

"There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy not only when she begins to take cargo on board but when *she breaks ground for the voyage.* The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point *up to which the warranty of seaworthiness extends.*" (Italics ours.)

In the *Irrawaddy*, 171 U. S. 187, at 190, this Court said:

"Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy *at the time of beginning her voyage.* * * *" (Italics ours.)

And in the *Southwark*, 191 U. S. 1, at page 6:

"Before the passage of the Act of Congress of February 13, 1893, known as the Harter Act, it was the settled law of this court that, in the absence of special contract, there was

a warranty upon the part of the shipowner that the ship was seaworthy *at the beginning of her voyage.*" (Italics ours.)

The same rule was restated in the recent case of *Earle & Stoddart* v. *Wilson Line,* 287 U. S. 420, at 426, as follows:

"Those cases" (the *Edwin I. Morrison,* 153 U. S. 199; the *Caledonia,* 157 U. S. 124, and the *Carib Prince,* 170 U. S. 655) "enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness *at the commencement of the voyage.* The warranty is absolute that the ship is in fact seaworthy *at that time.* * * *" (Italics ours.)

To the same effect:

The Irrawaddy, 171 U. S. 187, 190.

The law on the subject is summarized in *Carver on Carriage by Sea* (7th Ed.), Section 21, as follows:

"The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one: viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing.

On the other hand, there is no undertaking that she will continue fit after sailing. If from any cause she afterwards becomes unseaworthy, and this leads to loss, the shipowner is only liable if the cause was one for which he was answerable."

In the *Vortigern,* 1899 Pr. D. 140, 152, the Court pointed out that "there is no warranty that the ship shall continue seaworthy during the voyage."

In *McFadden* v. *Blue Star Line,* 1905, 1 K. B. 697, at 703, the Court said that

"it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage."

And at page 704:

"The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed; it takes effect at the time of sailing, and at the time of sailing alone."

(b) *Cases under the Harter Act and the Jason Clause.*

It is well settled that the rule is the same with respect to the time when the requirement of Section 3 of the Harter Act speaks.

In *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, suit was brought for damage to cargo by sea water in consequence of an unfastened port in the ship's side. It was argued that Section 3 of the Harter Act was a defense, even though the ship had been unseaworthy on sailing. This Court said, at page 225:

"We cannot accede to a view which so completely destroys the general rule that seaworthiness *at the commencement of the voyage* is a condition precedent and that fault in management is no defense when there is lack of due diligence *before the vessel breaks ground.*" (Italics ours.)

The requirement of the Harter Act

"in our judgment means due diligence on the part of all the owner's servants in the use of the equipment *before the commencement of the voyage and until it is actually commenced.*"

At page 226:

"The obligation was to use due diligence to make her seaworthy *before she started on her voyage,* and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy *when she sailed,* or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as *well before as after sailing.*" (Italics ours.)

The same rule was reaffirmed in the *Southwark*, 191 U. S. 1, at 13, in the following language:

"As we have before stated, the right of the carrier to be exonerated in the respects named in the Harter Act depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. The burden of proof being upon the carrier to show that he has exercised due diligence to provide a seaworthy vessel *at the time he received the meat and started upon the voyage*, the question arises, was this duly discharged?" (Italics ours.)

To the same effect, the *Wildcroft*, 201 U. S. 378, at 386:

"In order to have the benefit of the exemptions provided in the Harter Act * * * it was incumbent upon the shipowner to prove that the vessel was seaworthy *at the time of beginning the voyage* or that due diligence had been used to make her so." (Italics ours.)

In the *Steel Navigator*, 23 Fed. (2d) 590 (C. C. A., 2nd Cir.), the Court said (pp. 591, 592):

"The covenant of seaworthiness is to be determined when the ship breaks ground and only then. (Citing cases.) * * * Especially is it necessary to remember that the measure of what can in any event be demanded of her is her fitness for the whole voyage as contemplated at the outset. Adjustments made necessary by subsequent events pertain to her management, and cannot touch her seaworthiness."

2. If a vessel was seaworthy on starting her voyage, her owners are entitled to the benefits of the Harter Act and the Jason clause, even though subsequent faults or errors in management or navigation have made the vessel unseaworthy at sea, at ports of call, or at destination.

(a) *At Sea.*

In the *Silvia*, 171 U. S. 462, the crew failed to close certain iron shutters in heavy weather at sea and cargo damage resulted. Although the ship was, of course, unseaworthy for such weather with the shutters open, she had been seaworthy on sailing, and was therefore entitled to the benefits of the Harter Act.

To the same effect:

The Newport News, 199 Fed. 968;
The Carisbrook, 247 Fed. 583.

(b) *At Ports of Call.*

In the *Steel Navigator,* 23 Fed. 590 (C. C. A. 2nd Cir.), the ship was seaworthy when she left her loading port. At a port of call, her after peak was filled with ballast water and the crew neglected to close securely a cover, through which water leaked and damaged cargo. It was held that, since this was a fault in management, the Harter Act protected the ship, although she was unseaworthy when she sailed from the port of call.

Failure properly to close valves in a pipe line at a port of call, with the result that ballast water enters the cargo, is likewise a fault in management.

Jay Wai Nam v. *Anglo-Amer. Oil Co.,* 202 Fed. 822 (C. C. A., 9th Cir.).

Negligent inspection of the vessel at a port of call is a fault in management, within the Harter Act.

United States v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A., 2nd Cir.);
The Milwaukee Bridge, 26 Fed. (2d) 327, 330 (C. C. A., 2nd Cir.).

In the *Guadeloupe,* 92 Fed. 670, the ship was seaworthy on sailing but was damaged by a storm. She put into a port of refuge, but the master failed to make sufficient repairs, and damage to cargo resulted. This was held an error in management, within the Harter Act.

(c) *At Destination.*

In the *Wildcroft,* 201 U. S. 378, cargo was damaged at the port of destination by fresh water taken in from the river to fill a tank, because of the engineer's neglect to close a valve. This was held an error in management, for which the ship was not liable under the Harter Act.

To the same effect, *The Indrani*, 177 Fed. 914 (C. C. A., 2nd Cir.).

In all of the foregoing cases, damage was caused because the ship was unseaworthy; but, since she had been seaworthy at the outset of her voyage, she had fulfilled the conditions of the Harter Act and was entitled to its protection.

3. When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the management of the vessel, for which the shipowner is not liable.

The above proposition is directly supported by the following decisions already referred to:

The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, 216 Fed. 61 (C. C. A., 2nd Cir.);
The Milwaukee Bridge, 26 Fed. (2d) 327 (C. C. A., 2nd Cir.).

Those decisions are correct in principle, and there is no decision in any other circuit at variance with them. The petitioners seem to concede this proposition (brief, pp. 25, 31).

From what has been said, it is beyond question (1) that the duty as to seaworthiness imposed by the Harter Act and by the Jason clause is completely fulfilled if the ship is seaworthy when she leaves her loading port; (2) that if she subsequently becomes unseaworthy, at sea or in a port of call, that fact does not deprive her of the benefit of the Harter Act or of the Jason clause.

The petitioners do not question the finding of both courts below that the *Isis*, on sailing from her loading ports, had fulfilled the requirements of the Harter Act, the Jason clause and the implied warranty of seaworthiness. Consequently, the respondent is entitled to the benefit of the Harter Act and of the Jason clause as regards errors in navigation,

and even (if the question arise) as regards errors in management, causing the vessel to leave a port of call in an unseaworthy condition.

It is important to observe that this is *not* a case of voyage in stages. There are cases where a vessel sails without being seaworthy for the entire voyage—for instance, not having sufficient fuel to carry her to her final destination—but where she is seaworthy to proceed to the first port of call, at which the deficiency in fuel, etc., is to be made good. It is well settled that, on such a voyage in stages, the vessel need not, at first setting out, be seaworthy for the entire voyage, but only for the first stage, provided, however, that, at her port of call, she is made seaworthy in the respect of the deficiency for the remainder of the voyage or for the next stage. If this is not done, she is considered to have been unseaworthy *ab initio*. In such cases of voyage in stages, the failure to remedy at a port of call a deficiency which existed when the vessel originally sailed relates back to the original sailing, and such a vessel has not complied with the terms of the Harter Act.

See:

The Willdomino, 300 Fed. 5, 11, 12;
Carver, Carriage by Sea (7th Ed.), Sec. 19-B.

The Circuit Court of Appeals for the Second Circuit in the *Steel Navigator,* 23 Fed. (2d) 590, 592, recognized the principle as a *relaxation* of the ordinary warranty of seaworthiness.

The Commissioner (R. 530) considered the doctrine of voyage in stages and concluded, quite correctly, that it had no application to the present case. The Circuit Court of Appeals took the same view (R. 560). Indeed, it is conceded that the *Isis* was seaworthy when she left her loading ports and that no deficiency was left to be supplied at subsequent ports of call. Consequently the authorities as to voyages in stages, a number of which are cited by the petitioners, are not in point here.

SECOND.

The stranding was due to the negligent navigation of the pilot.

The Commissioner and both courts below found as a fact that the stranding now in question was caused by the pilot's negligent navigation. The Commissioner said (R. 516):

"* * * I find and advise the court that the stranding was caused by an error in navigation on the part of the pilot; and that unseaworthiness, if any, in respect of the steering gear of the *Isis* did not cause or contribute to the stranding."

A formal finding to this effect was made in the Commissioner's report at R. 533. The District Court confirmed it (R. 544-548).

The Circuit Court of Appeals said (R. 560):

"The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

On familiar principles, this Court will not disturb this finding, made by both courts below, unless it is manifestly unsupported by the evidence.

Compania la Flecha v. *Brauer,* 168 U. S. 104, at 123;
The Carib Prince, 170 U. S. 655, at 658;
International Navig. Co. v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, 224;
The Germanic, 196 U. S. 589, 595;
The Wildcroft, 201 U. S. 378, 387.

In *Davis* v. *Schwartz,* 155 U. S. 631, at 636, the Court said:

"As the case was referred by the Court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so

far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of the jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this Court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

This is especially true where the reference was by consent, as it was here.

The Elton, 83 Fed. 519, 520 (C. C. A. 4th Cir.).

The evidence in support of this finding is summarized, for the convenience of the Court, in Appendix A (pp. I-IV, *infra*).

The foregoing points, it is believed, suffice to dispose of the case. On leaving her loading ports, the ship had fully complied with the Harter Act and the Jason clause. Therefore, she was entitled to their benefit in respect to errors of navigation. It has been found by two courts, on ample evidence, that the accident in question was due to an error of navigation; and the conclusion inevitably follows.

Nevertheless, in view of the argument on other points in the petitioner's brief, those points also will be dealt with, though, it is submitted, they are in reality immaterial.

THIRD.

The *Isis* was in fact seaworthy and fit to proceed, when she sailed from Bremen.

The Commissioner found that the *Isis* was seaworthy and fit to proceed with the tugs on sailing from Bremen (R. 525). The District Court specifically made the same finding (R. 545, 546). The German Seeamt, or Court of Inquiry, whose report was offered in evidence by the petitioners,

reached the same conclusion. Its finding is quoted at page 32, *infra*. The opinion of the Circuit Court of Appeals on this subject has already been discussed (pp. 8-9, *supra*).

The petition for certiorari does not assert that the *Isis* was unseaworthy, except in that

"her rudder * * * was bent so that, even with the rudder lashed amidships her course would be erratic and she could not make such a voyage safely while being steered by tugs" (Petition, p. 3).

There is no magic about the word "seaworthy." It means, not that the vessel is perfect, but that she is reasonably fit for the service which she is to perform. She must have merely that degree of fitness which a prudent owner would require.

The general rule is stated in the *Silvia*, 171 U. S. 462, at 464, as follows:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

The foregoing statement is illustrated by a long line of authorities, both prior and subsequent.

In the *Marlborough*, 47 Fed. 667, the Court said (p. 670):

"What constitutes seaworthiness is not, I think, open to controversy. The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety; and she need not be the safest. A new vessel, of the highest order of construction, is safer than one several years old and of a lower order of workmanship. Yet the latter may be, and, if in good condition, is, seaworthy. A majority of vessels in the merchant service, employed on the most dangerous voyages, are of the latter description."

In *McCaldin* v. *Cargo of Lumber*, 198 Fed. 328, the Court said (p. 329):

"A vessel need not be perfect, or such as cannot break down except under extraordinary peril. If such were the

requirements, our merchant marine would altogether disappear. The rule governing is founded, as usually in matters of this character, on good sense and sound reason. The degree of fitness demanded is that which an ordinary, careful, and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it, Carver on Carriage by Sea, Sec. 18, p. 21. * * *"

This decision was affirmed (202 Fed. 735).

Other cases discussing the question are:

The Titania, 19 Fed. 101;
Hamilton v. *United States,* 268 Fed. 15;
Brick v. *L. I. R. R. Co.,* 245 N. Y. 222.

The English cases lay down the same rule.

Bradley v. *Fed. Steam Nav. Co.,* 24 Lloyd's List Rep. 446; aff'd in the House of Lords, 17 Asp. M. C. 265.

The test of seaworthiness varies with the service to be performed. A ship may be seaworthy to load cargo, or to lie at anchor with it on board, when she is not seaworthy to sail (*McLanahan* v. *Univ. Ins. Co.,* 1 Pet. 170, 184). She may be seaworthy for one voyage but not for another. As was said by the Circuit Court of Appeals for the Second Circuit in the *Sagamore,* 300 Fed. 701, 704:

"Unseaworthiness is a comparative term. A vessel may be perfectly seaworthy for cargo-carrying purposes around the harbor, and not be seaworthy for oceanic carriage; and she may be seaworthy for the carriage of a load of lumber, and not be seaworthy for a load of steel rails."

So she may be perfectly seaworthy to proceed from Bremen to Hamburg with the assistance of tugs, when she might not be fit to go unaided, or to cross the Atlantic. The question is simply, had she the degree of fitness which a reasonable owner would require for the particular thing which she was to do?

Obviously it cannot be said as matter of law that ships must not be towed or, if an accident has disabled the steering gear, must not proceed with the aid of tugs. The question is one of fact in each case.

To enable this Court to re-examine the question, if desired, the overwhelming evidence on the subject is here summarized:

1. The alleged bend in the rudder, if it existed, was immaterial, as found by both Courts below.

The criticism made by the petitioners is based chiefly on the fact that, when the ship was drydocked, following her *second* stranding, it appeared that the corner of the bottom of her rudder was bent to a maximum of 5 degrees to starboard. This deflection diminished to nothing halfway up the height of the rudder and also about halfway along its fore and aft width (R. 239, 246).

There is no proof that this bend existed when the *Isis* left Bremen, or that it was not caused by her second stranding—indeed, the respondent contends that it was, in all probability, occasioned when the ship's stern struck at the time of the second stranding (pp. 26-28, *infra*). But, assuming that the bend was present when the ship left Bremen, it was a matter of no consequence, because, as the experts testified, as common sense shows, and as both Courts below found, such a slight deflection would have had absolutely no practical effect on the steering of the ship. The evidence of the experts shows that the *whole* of the rudder has to be turned to an angle of 10 degrees, before it has any appreciable effect on the ship, at the speeds involved in this case. This deflection affected perhaps 20 per cent. of the rudder's surface, and, even in this comparatively small area, would not average more than 2½ degrees. It was the equivalent of about one-half of one degree of deflection of the entire rudder blade, and it needs no argument to show that a rudder put over one-half of a degree, or one degree, has no perceptible effect. Not only was this the testimony of Mr. French, the Chief Surveyor of Lloyd's in the United States, and of Captain Davis, head of the marine and salvage department of

Merritt-Chapman & Scott, whom the Commissioner rightly found to be by far the most competent practical expert examined, but the Commissioner found definitely that, assuming that the bend existed at the time when the *Isis* left Bremen, it did not make any difference. He said (R. 524):

"These views I adopt as far more convincing than those to the contrary of the other witnesses who failed to support their conclusions with satisfactory reasons from experience."

At R. 525:

"I therefore conclude that the *Isis* was not unseaworthy on sailing from Bremen under the conditions under which she actually did sail, including the assumption that she had a deflection in her rudder blade of 5° in the lower half, which was unknown to those in charge of her."

The District Court concurred in this conclusion (R. 545, 546).

The Circuit Court of Appeals (R. 561) said that "it was established that it" (the bend) "had no effect upon the navigation of the vessel."

Here again there is a finding of fact by the Commissioner and by both Courts below; and, since there is ample evidence to support it, it will not be reviewed here. The evidence on this subject is summarized in Appendix C (pp. VII-X, *infra*).

2. The rudder blade was carefully inspected before the Isis left Bremen and was found to be straight.

So long as the *Isis* was actually seaworthy, the character of the inspection at Bremen makes no difference. In fact, however, the Commissioner hardly did justice to the measures which were taken by the respondent. Mr. French testified that, in similar cases, he simply has a diver's report on the rudder (R. 390). In the present case, a diver reported that the rudder was in perfect order, after he had gone down and examined it four times (Krueger, R. 87). Reichenbacher would have been justified in sending the ship out on this examination alone, but, as an additional precaution, he had her

drydocked and the water pumped out, so far as it could be with the cargo on board. The inspection was then made, shortly after 5 P. M., by five competent men, four of whom were in a small boat directly astern of the rudder. The surveyors were Reichenbacher, the marine superintendent; Schubert, an inspector employed by the respondent; Menck, the man in charge of the shipbuilding and repair work of the Weser Shipyard; Wuehrmann, inspector of the Weser Company's drydocks and a former ship master; and the master of the *Isis*.

The water was pumped down so that more than three-quarters of the blade was exposed, and, since the deflection about which the libelant speaks extended halfway up the blade, it would surely have been seen if it had been there when the inspection was made. It is certain that all of the rudder which was out of water was straight, and the small section which was below water was examined by hand, by straight edge and by a powerful searchlight, and that also was found straight. Captain Reichenbacher testified (R. 158, 159):

"Q. Did you see her in drydock? A. Yes.
Q. Did you examine the rudder? A. Yes, I did.
Q. In what condition did you find the rudder? A. The rudder blade was in good order; there was nothing that you could see in the blade. But we could see that the rudder stem was twisted to starboard.

* * * * * *

Q. Was the rudder blade itself twisted or bent in any way? A. No, that was straight and in good order."

At R. 255:

"Q. So you were looking to see if the rudder blade was straight? A. I was absolutely sure there was nothing wrong with the rudder blade."

Menck, chief engineer of the Weser Company, said (R. 194):

"Q. What was the condition of the rudder? A. The rudder blade was straight but the rudder post was twisted."

If the bend was there when the vessel was docked, it must have extended above the water line for a distance of 4 to 5 feet directly in front of the eyes of the four experienced men who were in the small boat right at the rudder blade. *They could not have failed to see it if it had been there.* They all say that it was not there (Reichenbacher, R. 159, 253-255; Menck, R. 194, 195; Wuehrmann, R. 198; Schubert, R. 242, 244; Krueger, R. 58, 59). It is difficult to dismiss them all as either perjured or incompetent.

As for the remaining 3½ feet, a man's arm would easily run down 2 feet (Reichenbacher, R. 254) and any bend could be detected without difficulty. In addition to that, a straight edge was used and this is the standard method of testing. The petitioners' witness McLennan so states (R. 294, 297). Captain Davis testified that an examination with a straight edge was a proper method to use, and that such an examination would show even a slight deflection (R. 409).

Reichenbacher testified (R. 254):

"After that we used a small piece of wood and the rudder was like this (describing) and we were searching down to the bottom to see whether there was anything wrong.

Q. You have indicated with your hands the putting of strips of wood down to the bottom? A. Yes.

Q. In the first place, about these pieces of wood, you indicated with your hands that you placed the strips of wood up and down the sides of the rudder in different places? A. Yes.

Q. Could you tell in that way whether the last two or three feet of the rudder was straight or not? A. Everything was exact—it was quite straight and there was nothing bent.

Q. And could you be sure of that with your examination? A. Yes, quite sure."

It should be noted that two of these surveyors were repair men, who would have been glad to find something wrong with the rudder and thus to get a job for their yard. Menck, one of these two, examined the rudder at this time and also when the ship was drydocked after the *second* stranding. *He said that the blade was straight the first time and was bent the second time* (R. 194, 195).

Both the petitioners and the Commissioner refer to the statement of Captain Asmus (R. 246, 247) as meaning that the surveyors' inspection would not have disclosed this bend. The evidence in question is as follows:

"Q. I mean this: Assuming that the rudder was under the water, and that the only means you had to find out the twist was by taking a rod and running it up and down the rudder, do you think that such a rod would have disclosed the twist which you saw with your eye? A. No."

This question presupposes that the rudder is *under water*, and that an attempt is being made to find this slight deflection at a depth of some 18 feet below the surface by "running" a rod up and down; whereas, in fact, the rudder was almost entirely out of water and the examination was by a straight edge. The question has nothing whatever to do with the actual facts.

To repeat—the rudder was examined by actual eyesight by four men, besides the master, from the top down to a point *some 5 feet below the point where the bend is alleged to have started.* The lowest 3 or 4 feet were tested by the application of a straight edge and by feeling with the hands down nearly to the bottom of the rudder.

The discussion is perhaps superfluous, since the bend, if present, had nothing to do with the accident, but it should be pointed out that the probability is that the bend occurred at the time of the second stranding, not of the first. The fact that the surveyors found the rudder straight before the *Isis* left Bremen, but bent when she returned after the second stranding, strongly indicates this. That was also the opinion of the master. When the *Isis* was at or near the point of land between the two rivers, as her bow was swinging to starboard before the Lesum current, her stern swung to port, as it necessarily would, and struck bottom twice (R. 67, 78, 102-104, 123). Her master thought that the bend in the rudder occurred at this time. He said (R. 123):

"Well, I think that bend—we get that bend on the first time we touched the ground with our stern—I mean on the trip down from Bremen on (to?) the Lesum."

Q. When the boat hit twice in the vicinity of the buoy at the Lesum bank, and before she finally swung around across the river? A. Yes."

The chart (Exhibit 8) shows, and the buoy master testified (Seeamt, R. 461), to a shoal spot on the westerly (or port) side of the bank on which the ship was stranded. When her officers took soundings, the buoy and the shoal spot were opposite her No. 4 hatch (R. 104, 105). These soundings were made *after* the tugs had pulled her a little distance astern from the position where she originally struck (R. 67, 105). Consequently, the buoy and the shoal spot were about under her stern when she originally brought up (R. 103, 105, 113, 114), and, as her stern swung to port and struck, the lower corner of the rudder would be very likely to become bent.

The master testified (R. 103):

"Well, on this buoy is not much water. There is where the stern hit the ground—that isn't real bank here on this buoy, the bank is a little further in, but there is not much water, and the ship was 3½ (23½?) feet deep. * * *"

Witnesses on both sides agree that rudder stocks are often twisted without bending the rudder blade (McGregor, R. 371; Jordan, R. 342; French, R. 379; see Davis, R. 404).

The petitioners suggest (brief, appendix, p. v.) that the rudder could not have been damaged in this way without damaging the stern post or frame. But the rudder tip is several feet aft of the stern post. It is hardly possible that the stern post *could* have been affected by a blow on the tip of the rudder. The petitioners' objection would apply equally to their own theory that the bending occurred at the first stranding. Their own witness, McLennan, testified (R. 314) to a case of exactly what the petitioners say is impossible.

The petitioners suggest also that, if the rudder had struck, the impact would have made the quadrant screw give and the rudder move, thus causing the screw to score the quadrant. Obviously that depends on whether or not the

rudder blade would bend slightly and take up the blow before the pressure would force the quadrant loose from its screw. Since here the rudder *did* bend, it is not likely that the quadrant also would have been affected.

The Seeamt found (R. 478) that the bending occurred at the time of the second stranding. The Commissioner was uncertain when it occurred (R. 522).* The District Court made no further finding on the subject. The petitioners suggest that the Circuit Court of Appeals found that the rudder was bent on sailing from Bremen. But when the opinion is read as a whole it seems plain that the Court made no finding on the subject. It assumed, *arguendo*, that the rudder was bent, but considered the question immaterial, for the reason that the bend, if present when the ship left Bremen, was a matter of no consequence (R. 561, 562).

3. The rudder was properly lashed and secured.

There seems to be no dispute about this. No witnesses contradicted the testimony given by all of the surveyors and experts who were present when the work was done.

They put the rudder amidships and lashed it by means of wire ropes bent through holes in the rudder blade aft (Reichenbacher, R. 159, 160).

"We led them on deck by tackles on both sides and heaved them tight with the ship's winches" (R. 159).

They also screwed down the rudder quadrant so that it could not be moved (R. 159, 160). The rudder was thus held straight amidships, and

"there was no possibility of moving the rudder in any way. It was as firm as iron" (R. 159).

They tried to move it and could not (R. 171). Similar evidence was given by Menck (R. 194). To the same effect,

* The Commissioner speaks of the burden of proof regarding this subject as being on the respondent (R. 522). In fact, it is on the petitioners. They are asserting a cause of action for negligence in sailing from a port of call with the rudder bent and the burden of establishing is on them.

Wuehrmann, R. 198 (the rudder was "right amidships"), 205; Schubert, R. 242; Krueger, R. 60, 61; Schier, R. 262-264.

The rudder was still amidships in its original position when the vessel returned after the second stranding (Menck, R. 194, 195; Asmus, R. 239; Schier, R. 264, 265).

4. The Isis was in good condition to proceed and the tugs were of ample power.

The *Isis* was a twin-screw vessel with total horsepower of about 2,400 (R. 162). She was in perfect trim to handle, drawing 18 feet 5 inches forward and 23 feet 5 inches aft (R. 163). As the Commissioner says (R. 523):

"Capt. Davis considered that the fact that the *Isis* left Bremen about 5 feet by the stern was of material assistance in controlling the vessel at slow speed with the assistance of tugs" (see Davis, R. 401).

The tug *Hoheweg* was made fast ahead. She had 1080 horsepower (R. 162, 177). The *Lankenau* was made fast to the port side abreast of No. 4 hatch. She had 800 horsepower (R. 176). The *Eversand* was in a corresponding position on the starboard side. She had 810 horsepower (R. 177). These tugs more than doubled the power which the *Isis* would have had if she had been proceeding down the river alone.

The master and a large number of experts familiar with the river have testified that there was ample power to handle the ship, and that she was perfectly seaworthy to proceed (Krueger, R. 61, 62; Schier, R. 268; Reichenbacher, R. 160, 163, 164, 170; Klassen, R. 178, 180; Julicher, R. 185, 186; Menck, R. 196; Wuehrmann, R. 199; Saxe, R. 210, 215, 218; Thiessen, R. 221; Sievers, R. 233; Asmus, R. 238).

Mr. French, Captain Davis and Captain Huseby all agreed that the tugs were properly located; that they had ample power; and that the ship's condition made it perfectly proper for her to go. Mr. French said (R. 382) that she was better off with her rudder lashed and with the towboats than she would have been with her own rudder and no tugs.

Captain Davis expressed the same opinion, except at high speeds. He said (R. 402):

"A. At high speeds a ship can be handled better with her rudder than with tugs. At low speed, the tugs are better.

Q. Suppose you were called upon to stop a vessel in a narrow channel like the Weser to wait for a ship to come up the river and you had a tide running against you of about three kilometers per hour, which would you prefer, to have three tugs as the *Isis* had and the rudder lashed, or to have your own engines and your rudder in working order? A. The tugs.

Q. Would there be any question in your mind about it? A. No question at all about that."

He considered the *Isis* fit to proceed under the conditions stated (R. 402).

Captain Huseby said (R. 427) that she had

"more power than we ever would have on a ship of that size, regardless of where she may go. Besides that, you have a twin-screw ship and the two propellers working can be used if you want to use them. I would say that you were in a better position and better shape to go up that river with your own ship's power, a twin-screw ship and three tugs, than with a ship alone going up.

Q. Or going down? A. Absolutely."

The captain of the vessel testified specifically (R. 74):

"* * * we had more steering power at that time than we would have had without tugs and the rudder intact."

As already stated, there were five men present when the rudder was inspected. All, including Captain Krueger, approved of sending her (R. 160). The towage was also discussed with Mr. Meinicke, director of the Unterweser Towage Company, who also approved (R. 160), as did the surveyor of Germanischer Lloyds (R. 161, 184), and the available underwriters (p. 4, *supra*). Captain Krueger was not limited as to the number of tugs but was at liberty to engage more, if he wanted them, which he did not (Krueger, R. 62;

Reichenbacher, R. 162). Klaasen, the only one of the tug masters who was available for examination, said that the tugs had power "completely" sufficient to handle the *Isis* (R. 178, 180). To the same effect Julicher, chief surveyor for Germanischer Lloyds (R. 185-186); Krueger (R. 68, 74, 79). Similar evidence was given by Menck, chief engineer of the Bremen Dock (R. 196), by Wuehrmann (R. 199, and by Saxe (R. 210, 215, 218). Thiessen, another towage expert on the Weser, said that the tugs "were absolutely sufficient" and that the ship was safe and seaworthy for the trip (R. 221).

The evidence taken in Hamburg shows a large number of cases of towage, up and down the Weser and similar rivers, of vessels, some without engines, others in distress, many of them much larger than the *Isis*, as well as the towage of large battleships and floating drydocks (R. 165, 174, 175, 177, 198, 208-210, 222-225, 230-232).

The petitioners called three experts. Two of them were engineers, who had had no experience in navigation whatever, and one was a sea captain, who was once towed from Madeira to Barry, and who has been assisted by tugs in rivers. He has never done any towing himself and obviously could not compare in experience with Davis or with Huseby.

The petitioners' experts, by the way, constantly spoke of the advantage of a ship's having *her own power*. They constantly compared a ship which was solely in the hands of tugs with a ship which had her own power. Here the *Isis* had both her own power *and* tugs.

Of course, as the experts say, at slow speeds tugs are obviously more efficient than a rudder, and everyone knows that a steamer, traveling at a low speed, answers her rudder *very* sluggishly, if at all.

The petitioners do not mention the finding of the Seeamt (which *they* offered in evidence) that the ship was in proper condition to proceed with the assistance of the tugs, and that the tugs had adequate power. The Seeamt said (R. 477):

"It must be admitted therefore that no fault was committed with regard to the number and power of the tugs.

* * * There should have been no hesitation in starting the voyage with a vessel so equipped and aided. It may be pointed out that flotilla tows disposing of much less steering and motion capacity, navigate the river Weser without endangering navigation or themselves, for instance pontoons, cranes, etc., which have no engine of their own. There is nothing extraordinary in starting such voyage and it can never be avoided."

Therefore, no less than fourteen witnesses testified, and the Seeamt found, that it was perfectly proper for the ship to proceed under the actual circumstances, and the only evidence to the contrary is the considerably qualified statement of the libelant's own three experts, two of whom were not, and never had been, navigators at all, and who were contradicted by the respondent's more credible and experienced experts.

With this record, the findings of the Commissioner and of the District Court that the ship was seaworthy and fit to proceed were amply supported by evidence.

5. The navigation of the Isis, up to the time of the negligence which caused her stranding, proves that she was perfectly fit to proceed.

The facts that the *Isis* was fit to proceed; that she did not have a tendency to sheer constantly to starboard; that she could be handled by the three tugs; and that the tugs and her engines were effective and perfectly capable of steering her, are all established by the navigation of the vessel from the time she left Bremen up to the accident at the Lesum.

She left her dock at 1.30 A. M. (R. 483) and actually started down the river at 2.11 A. M. (Krueger, R. 75). It was about 3.52 A. M. when she stranded at the mouth of the Lesum (see deck log, Exhibit 11, R. 483). During the intervening period, she was navigating a narrow channel, and, if there had been any difficulty in handling her, it would have developed almost at once, as the experts on both sides say. No such difficulty developed. Captain Krueger said (R. 73):

"Q. As you went down from Bremen until you got down almost to the Lesum, please state whether or not you had

any difficulty in steering your ship, with the tugs and your own engines. A. No, we had no difficulty at all, because the ship was steering very well down the river up to this position here where we passed the other boat. We have lots of bends here, right here too, where we passed all right, and the ship was going all right all the time.

Q. Were your engines used to help in steering around the bends? A. Yes.

Q. Either to port or starboard? A. Yes.

Q. Did they work all right with the tugs? A. Yes.

Q. Were there times, as you came down the river, that both of your engines were stopped and the tugs handled you alone? A. Oh, yes, we had sometimes stopped for 20 minutes, and the tugs was handling the ship all alone."

To the same effect, Krueger (R. 64, 74, 95, 128, 129).

Chief Officer Schier testified (R. 267):

"Q. During the time that you were on the bridge, until you left at 2.30, please state whether or not there was any trouble in steering your boat as you went down the river? A. No, there was no trouble.

Q. Did she show any indication of sheering in either direction? A. No."

Klaasen, master of the tug *Lahkenau*, said (R. 178):

"As you went down the river with the ship before this accident happened, had you any trouble in handling or steering the ship? A. No."

The engine maneuver book (Exhibit 7) shows precisely how the propellers of the *Isis* were operated. The abbreviations used in the maneuver book are explained and translated at R. 77, 78. A translation of the entries is annexed to this brief (Appendix B, pp. v-vi).

Not only is there no indication in the operation of the engines that the ship had any tendency to sheer to starboard, but the maneuver book affords clear proof to the contrary.

We know the time of departure, the time of stranding and the distance. Therefore, the speed (a little less than 5 knots) is known and the time at which the vessel reached various points can be closely approximated. With the vessel pro-

ceeding steadily, there can be no substantial error in the captain's testimony as to where the ship was at the various times given, and the maneuver book shows that the engines were being used for steering purposes, in conformity with the bends in the river.

After the *Isis* started down the river at 2.11, the first part of her passage, to kilometer 9, which was reached at 2.40, required a swing to port (see chart; Krueger, R. 75). If the rudder had had a substantial bend to starboard, it would have been necessary to keep the starboard engine running ahead, more or less constantly, in order to offset it, but at 2.12, the starboard engine was stopped and remained stationary until 2.18, when it was put *slow astern*. At 2.19, it was again stopped and remained so until 2.25. At 2.24, the port engine was stopped until 2.40 and the starboard engine was then used, precisely as one would expect it to be used; in steering the ship on the bend to port. The orders "slow ahead" and "stop" were repeated at intervals of a minute, except that, from 2.30 to 2.35, the starboard engine, as well as the port, was *stopped*, save for a momentary kick ahead at 2.32.

From 2.40 to 2.53, the vessel ran from kilometer 9 to kilometer 11 (Krueger, R. 76). That is practically a straight reach (see chart). The port engine was stopped for 10 of these 13 minutes (from 2.40 to 2.43 and from 2.46 to 2.53), and the starboard engine was stopped for 8 minutes (from 2.40 to 2.41, from 2.42 to 2.44, from 2.45 to 2.50). Then came a slight bend to port, and the port engine was still from 2.53 to 3.16; while the starboard engine was stopped from 2.51 to 3.16, except for occasional kicks ahead at 2.54, 2.57, 3.04, 3.08, 3.12, 3.14. This, again, is what one would expect—the port engine stopped and the starboard giving occasional kicks ahead.

About 3.16, began a bend to starboard from the 13th kilometer, and accordingly the port engine was again used at intervals between 3.16 and 3.25, while the starboard was stopped most of the time (3.16 to 3.17, 3.17 to 3.18, 3.18 to 3.26).

It was at 3.40 that the *Isis* passed the other steamer bound up the river (Krueger, R. 77). Between 3.26 and 3.40 the

course was about straight (see chart) and the port engine was stopped for 10 minutes (3.25 to 3.32, 3.32 to 3.36), while the starboard engine was stopped for 8 minutes (3.26 to 3.27, 3.27 to 3.33, 3.34 to 3.35).

If the *Isis* had not been steering properly, that fact must have been disclosed, as Captain Davis testified (R. 412, 414), in the first quarter mile. The maneuver book, however, entirely corroborates the evidence of the master, the chief officer and tug captain that nothing of the kind occurred. Klaasen, master of the tug on the port side, said (R. 179) that his tug's engines were at full speed ahead "for the whole time" until the up-bound steamer came. If the *Isis* had been constantly sheering to starboard, this tug would have had to reverse her engines frequently.

The petitioners suggest that the master and the chief officer of the *Iris* gave evidence before the Seeamt that they had had trouble in steering on the way down the river, and they quote two passages from the Seeamt's findings. One of these (appendix, pp. viii and ix) is a purported translation of part of the master's statement to the Seeamt. The petitioners do not point out that the respondent has always denied the correctness of that translation. The original German and both translations appear at R. 459. When correctly rendered, the passage has no significance.

The Seeamt did say, at R. 473, in its findings that

"The vessel tended during the entire passage to swing to starboard," "particularly according to the declaration of Capt. Krueger."

The Seeamt, in this passage, confused the trip *up* to Bremen, after the first stranding, with the trip *down* after the second. On the former occasion, when the twisted rudder stock caused a starboard rudder angle of 45 degrees, the ship did keep sheering to starboard, as well she might (p. 2, *supra;* R. 55-56). But the record of the testimony before the Seeamt (Exhibit A, R. 455-468), which the *petitioners* placed in evidence, contains *nothing whatever* to the effect that the ship had any tendency to sheer on the way

down the river, except when she smelled the bank, etc., at the time of the accident. Captain Krueger testified in this case (R. 72-73) that neither he nor anyone else gave any such testimony before the Seeamt; and, as already stated, the Seeamt record bears him out. The report of the Seeamt, which the Commissioner found (R. 512) was inaccurate, simply confused the two trips. The Commissioner further found (R. 512) that the statements alleged to have been made by Captain Krueger before that body were

"sufficiently contradicted or explained by the captain's thorough examination and cross-examination when his evidence was taken."

The petitioners also seek to base an argument (appendix, p. x) on the remark of the chief officer, who was off duty and asleep at the time of the accident, that

"it surprised me that the *Hoheweg* could not hold the bow of the *Iris*."

As the chief officer said, that remark referred to the accident itself, not to any earlier difficulty (R. 269); and, in fact, during his watch (until 2.30 A. M.), there was no trouble at all in steering (R. 267-268).

At page x of their appendix, the petitioners seek to draw some inferences from the fact that the second officer of the ship was not called. It may therefore be proper to state that he would have been called at Hamburg, if he had been there. He would have been called in this country, if he had been here. Efforts were made to get him, and it was found that he had left on a long voyage to South America. As a matter of fact, the respondent did expect to call him, and regretted its inability to do so. There was no concealment or withholding of testimony.

On the same page, the petitioners say:

"It was the master who the Commissioner found testified untruthfully in relation to the dangerous condition of the rudder."

The Commissioner made no such finding.

There can be no doubt that the Commissioner and the District Court were correct in finding that the *Isis* with her tugs was fit and seaworthy to proceed.

FOURTH.

The decision to send the *Isis* with tugs was a proper one.

The decision was a practical one, to be made by practical men. Their duty was to make it honestly and reasonably. The evidence makes it clear that they did both.

In the petitioners' brief are assertions that the vessel was sent with tugs for the respondent's "own purposes" (p. 3) and "for the respondent's benefit" (p. 33). The implication is quite unfair. Most of the general average expenses of delaying her would have fallen on cargo, and the risk of sending her (if risk there was) was obviously far greater for the ship than for the cargo.

Reichenbacher testified that, in order to repair at Bremen, he would have had to discharge half the cargo, or about 3,000 tons (R. 171-173). They could not get the drydock for a long time, because another steamer had it engaged (R. 172); therefore, they would have had to take her out of the Weser to repair, or else to wait indefinitely. He said that the decision was "to save time and do the best for everybody" (R. 172). At R. 173:

"Q. Is it not the fact that the reason you did not repair the ship at Bremen was because you wanted to save time for the ship? A. No, not alone for the ship but to save the cargo too."

At R. 174, he said:

"Not only to save time, but to leave the cargo in the ship and to take it direct to the place of destination—so as not to take the Hamburg cargo out in Bremen."

And at R. 255:

"My idea was to keep the cargo in the ship and to deliver the cargo as quickly as possible because we were afraid to

take out the whole of the Hamburg cargo in Bremen and get the cargo more or less damaged, because they had heavy logs on deck and wheat and flour, and other things from the West Coast. So we thought that it would be best to leave the cargo in the ship, take it in dock and see what was wrong with the rudder, and we saw that there was nothing worse than that the rudder stem was twisted, so we thought it would be safest for the ship and the cargo to bring the ship to Hamburg and to make it safe in Hamburg."

Mr. Warns testified (R. 249):

"Q. Do you know what the reason was for towing the vessel rather than discharging the cargo? A. Yes, in order to save the cost of discharging the cargo, storing it and reloading it, and in order to avoid the cargo being damaged by those manipulations.

Q. Do you mean by handling in and out? A. Yes."

Mr. Brandt, a leading underwriter, testified (R. 145) that the decision was

"not only for the benefit of the shipowner, but for all interests concerned for the cargo as well, because if it had been necessary to discharge the cargo, quite a lot of expenses would have been incurred."

Eighty per cent. of these general average expenses would have fallen on cargo, not on the hull (p. 3, *supra*). Mr. French—one of the best qualified men in the world on such a subject—agreed with Reichenbacher that half the cargo would have had to be discharged to drydock the ship safely (French, R. 382). If this had been done, cargo would have been loud in its protestations that the ship ought to have been towed to Hamburg and repaired after the cargo had been delivered and that general average expenses ought not to have been incurred. If fire, or some other accident, had occurred, the cargo would have claimed that drydocking the ship and discharging the cargo was a deviation and would have argued that the cargo should not have been exposed to such risks. Cargo occupies the enviable position of taking no responsibility for such decisions and remaining free to criticize them if anything goes wrong.

The question confronting the employees of the respondent here was whether they should detain the ship and its cargo in Bremen for an indefinite period and incur large general average expenses, or do what every man who saw the ship approved, what all of the experts familiar with the River Weser approved, and what the Seeamt approved, namely, send her under her own power, with the assistance of tugs for steering purposes. They had the unanimous advice of competent men, including some who were not their own employees and whose interest as repairmen was to reach a contrary decision. They had the permission of all the underwriters with whom they could communicate, given by the body set up at Hamburg for just that purpose; they had an amount of power in engines and tugs which all the witnesses have considered adequate; and they had an accident because of a piece of clearly erroneous navigation. It was a reasonable decision, fairly and honestly made, and should not be attacked after the event. To put it at its lowest terms, it was fairly within the reasonable choices which were open. Certainly it was not negligence.

FIFTH.

There was no "intervention" by the shipowner which made Section 3 of the Harter Act or the Jason clause inapplicable to the pilot's error in navigation.

1. The facts do not show an intervention by the shipowner.

The inspection of the *Isis* at Bremen and the decision to send her with tugs were acts of the *servants* of the respondent. The decision was made by Reichenbacher, the marine superintendent, in consultation with the captain (R. 166).

The respondent's only actions were (1) sending Reichenbacher to consult with the master; (2) making inquiry through its insurance department to see whether the underwriters had any objection to carrying out the plan tentatively decided on by Reichenbacher and the master.

The petitioners argue as though the "intervention" of the respondent in sending Reichenbacher to advise with the master was a wrongful, rather than a praiseworthy act. In fact, it showed the conscientious care with which the situation was handled. A similar action was considered by this Court in the *Styria*, 186 U. S. 1, where a ship had loaded sulphur at an Italian port for delivery in the United States. Believing that sulphur had been declared contraband by Spain, the master relanded it and sailed. When his vessel arrived in the United States, she was sued by the owners of the sulphur, who alleged that, in relanding it, the master had failed properly to exercise his discretion, and had blindly followed his owner's positive orders. In rejecting this contention, this Court said (p. 20):

"In the case of *Nobel's Explosives Co.* v. *Jenkins* (L. R. 1896, 2 Q. B. 326), just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners,* if it were possible to get it before the emergency was over; and all that can be said is, that there was a *concurrence of judgment* between the ship agents and the master as to what was the proper course to pursue." (Italics ours.)

That was precisely the situation here; the master and the marine superintendent consulted and concurred in judgment.

The petitioners concede (brief, pp. 25, 31) that, if the captain had acted alone and had made an error, it would have been an error in management, within the Harter Act. It makes no difference whether the error is made by the owner's master, or by the owner's marine superintendent. If the situation had arisen in China instead of in Bremen, no one would claim that the protection of the Harter Act was lost, if an erroneous decision had been made by the ship's master or by the shipowner's port captain at the Chinese port. The law is not different because Bremen happens to be near the home port of the vessel, nor because Reichenbacher happened to be stationed at Hamburg rather than elsewhere. The re-

quirement of seaworthiness at the loading port, or due diligence to secure it, is absolute, and the shipowner is responsible if his servants, though competent, make an error; but no case has ever held that the shipowner is absolutely responsible for the correctness of such a decision as is here involved, at an *intermediate* port. As already stated, the very fact that, if made by the master, such an error would be excused under the Harter Act, shows that the owner is not absolutely responsible. Therefore, it is sufficient if a competent man is employed to examine into the case and to decide on the procedure. His error is an error in management. In the case of a corporation, the act of such a servant is not the personal act of the owner, unless the representative is one of the managing officers of the corporation, which Reichenbacher, of course, was not. No one has questioned, and no one can question, the competence of the men who made the examination of the *Isis* at Bremen. If they were competent, then, even if they made an error in their decision, it makes no difference. It was still an error in management.

The analogy of the Limitation Acts shows that, if a competent representative has been employed by the owner to make an inspection, the default of that representative is not the personal default of the owner.

In the *Annie Faxon,* 75 Fed. 312, the Circuit Court of Appeals for the Ninth Circuit held a shipowner entitled to limit liability in a case of boiler explosion where he had employed a competent representative to examine it, even though the examination had not been sufficiently thorough.

In *Quinlan* v. *Pew,* 56 Fed. 111, the Court held that (p. 118):

"even if the owner is chargeable under the statute with privity or knowledge, who permits a ship to sail from a home port without making provision for inspection or proper fitting away, yet he may rest his duty upon any suitable agent and, when he has done this, he may be relieved under the statute, although the agent may be negligent in some particulars."

The Court further held that the intent of the statute was that owners might properly act through agents and be entitled to limitation

"whenever, and so far as they have appointed a suitable representative, be he master, consignee or other agent, to supervise the ship, either at sea or at the home port or otherwise, and either for fitting her away, or navigating her after she is so fitted away."

There are, of course, many other similar cases.

2. Even if there had been intervention by the shipowner at the port of call, errors in management would still be within the Harter Act and the Jason clause.

The petitioners' position appears to be that, even though a vessel has complied with the requirements of the Harter Act and of the Jason clause by being seaworthy on leaving her loading port, still some exception from their benefits is to be implied in the event of a subsequent error in management made, not by the master, but by the owner or by the owner's marine superintendent.

There is certainly no such exception *expressed* in the Harter Act. That Act is merely one of the statutes regulating the liability of shipowners and light is thrown on its interpretation by a consideration of other similar acts, such as the Fire Statute and the General Limitation Act.

The Fire Statute, R. S. 4282, provides that a shipowner shall not be liable for damage by fire, unless such fire is caused "by the design or neglect of such owner." The General Limitation Act, R. S. 4283, gives exemption if the loss occurs "without the privity or knowledge" of the owner. It will be seen, therefore, that Congress has specifically provided in these two statutes that shipowners are not entitled to their benefit, if personally at fault. There is no similar provision in the Harter Act, as regards anything happening after the ship has sailed from her loading port. In this respect, there is a striking contrast between the Harter Act and the other acts referred to. It would be judicial legisla-

tion to insert such an implied exception in the Harter Act—more especially as that Act does make certain specific requirements of the owner.

An argument closely similar to this was approved by this Court in *In re East River Co.*, 266 U. S. 355, where it was held that, since Congress had particularly provided that limitation of liability could not be had as against a claim for seaman's wages, that specific exception excluded any other implied exceptions, such as claims for personal injuries.

It is interesting to contrast the extremely loose construction of the Harter Act which the petitioners advocate in this connection, with the very narrow and technical construction on which they insist in regard to unseaworthiness which causes no damage.

3. Intervention, if any, by the shipowner at the port of call did not affect the applicability of the Harter Act and the Jason clause to the pilot's error in navigation, which was the cause of the accident; but, at most, affected their applicability only to the shipowner's personal act and its direct consequences.

As already shown (pp. 13-14, *supra*), the statutory duty as to seaworthiness imposed by Section 3 of the Harter Act is completely fulfilled by seaworthiness on sailing from the loading port. The owner is then entitled to the statutory exemptions with respect to errors in navigation during that voyage. The voyage is the unit, and what constitutes the voyage is defined in the bill of lading. There is no authority or justification for saying that an error in management by the owner or by its marine superintendent at a port of call destroys the applicability of the Harter Act in respect to all matters—however disconnected—arising at any later period of the voyage.

The contention seems based on confusion in thought. Even if, as matter of policy, an exception were implied in the Harter Act, whereby its exemptions did not cover the personal errors of the owner, it would merely deprive the owner

of his protection *with respect to those acts;* it would not repeal the Harter Act for the rest of the voyage with respect to errors in navigation by a pilot, having nothing to do with the owner's acts. In other words, the owner's acts would merely give rise to a cause of action against him for negligence, to which he could not plead the Harter Act as a defense.

But, if his negligence had caused no damage, he would not be liable. Thus, in the *Malcolm Baxter, Jr.,* 277 U. S. 323, it was held that the owner of an unseaworthy ship was not liable for losses which were not the consequences of the unseaworthiness.

In the *Francis Wright,* 105 U. S. 381. at 387, this Court said:

"If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages."

So, if a shipowner makes an error in management at an intermediate port, and if, by reason of an implied exception, the Harter Act does not apply to that error, still the owner is not liable if his act does not cause damage. The Harter Act will still apply to other errors in navigation or management by the master or pilot.

To illustrate, suppose that a ship has complied with the terms of the Harter Act at the outset of her voyage; that the owner, being himself a pilot, takes charge of her at a port of call and pilots her to sea, and that, through his error in navigation, she has a collision. The owner then leaves the vessel; she proceeds in charge of her regular master; and, a week later, has another collision because of the master's error in navigation. Possibly the Harter Act might not apply to the first collision. It would certainly apply to the second.

In *Union Ins. Co.* v. *Smith,* 124 U. S. 405, at 427, this Court stated an analogous principle, saying:

"In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy

at the commencement of the risk, and the fact that she subsequently sustains damage and is not properly refitted at an intermediate port does not discharge the insurer from subsequent risk or loss provided such loss be not the consequence of the omission."

Assuming, therefore, that the respondent here intervened at Bremen and itself made an error of management, not covered by the Harter Act, in permitting the *Isis* to sail with a 5-degree bend in the tip of her rudder, then it would be liable if that error had caused the ship to strand. But here it is established by concurrent findings that that was not the cause of the stranding. Therefore there is no liability for that. It is established by concurrent findings that the cause of the stranding was the bad navigation of the pilot. To that the Harter Act is a defense, and the Jason clause gives the right to general average contribution.

In effect, the petitioners ask this Court to say:

"There is an implied exception in the Harter Act, whereby, if a shipowner who has complied with the Act at the loading port, makes an error of management at a port of call, which does no harm to anyone, he is thereby deprived of the benefit of the Harter Act with respect to all future occurrences on that voyage."

To state that proposition is to answer it.

The petitioners rely principally on three cases—*The Willdomino*, 300 Fed. 5; *The Waalhaven*, 36 Fed. (2d). 706; *The Valentine*, 131 Fed. 352.

The *Willdomino*, 300 Fed. 5, affirmed by this Court (272 U. S. 718) on the ground that there had been a deviation, was a case of voyage in stages. The steamer took on cargo at Messina, Italy. On her voyage she called at several ports. She did not have on board, when leaving Messina, sufficient coal to carry her to New York, her port of destination. When she left her last European port, her coal supply was still insufficient and, after putting into the Azores because of an accident to her machinery, she again failed to take sufficient coal to carry her through. On leaving the Azores, her master laid her course for New York, although he knew that her

fuel supply was insufficient. In consequence, a few days later, she deviated toward the dangerous coast of Nova Scotia and there stranded. The decision of the Circuit Court of Appeals was put on the ground that the vessel was unseaworthy and that this brought about a deviation. The affirmance by this Court was on the ground of deviation alone. It will be noted that the deviation was directly caused by the lack of sufficient fuel.

The petitioners (brief, p. 29) criticize the Circuit Court of Appeals in this case for saying that, in the *Willdomino,* "the fault arose at the inception of the voyage." The statement was quite correct. The vessel sailed originally with fuel insufficient for the voyage. This deficiency was not made good at the later stages of the voyage, and therefore, on principles already discussed, she was unseaworthy from the beginning.

In the *Waalhaven,* 36 Fed. (2d) 706, a steamer, bound from a German port to the United States, ran out of coal and put into St. John's, N. F. The master could have obtained sufficient coal at St. John's to enable him to reach Norfolk, where he was bound, but his owners, for purposes of economy, ordered him to take only a small quantity and to proceed to Louisburg. On the voyage to Louisburg, the steamer ran into an ice field, resulting in cargo damage. The Court held that proceeding to Louisburg, which was clearly outside of the route, constituted a deviation. The case is clearly not in point here.

In the *Valentine,* 131 Fed. 352, cargo was delivered to a steam lighter to be transported from a pier in Brooklyn to a pier in the North River. The lighter, because of congestion, was unable to tie up there and had to go to another pier for the night. The captain and engineer then left the vessel. Ice floated into the slip, holing the vessel's bottom, and she sank. The fires were banked and her pumps were not working. The Court decided against the owners on the ground of initial unseaworthiness, or, rather, improper manning. The Court said (p. 354):

"The loss in the present case arose from fault in the management of the vessel at Pier 42 (where she was tied up) *but the fault was not initiated there.*"

In the further extract quoted by the petitioners (brief, p. 55), it is said:

"But if the owners of the ship know that on the voyage, or at points intermediate or otherwise * * * the fires will be banked, * * * and that the captain and engineer will go ashore, and the rest of the crew will go to sleep, * * * and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer or connive at such custom or practice, such vessel is not properly manned, * * *."

It is, of course, true that if the owner of a ship *before the inception of the voyage,* either directs, or is aware, that 50 per cent. of the crew will leave her at an intermediate port, so that she will become unseaworthy, she is then not properly manned for the voyage. In the present case, however, the respondent neither gave directions, nor was aware, at the commencement of the voyage, that the *Isis* would leave Bremen with a slight bend in her rudder (assuming that to have been the fact). The cases are so far from being parallel that no real comparison can be made.

Texas & Gulf SS. Co. v. *Parker,* 263 Fed. 864, cited by the petitioners (brief, p. 26), holds that, when a ship sails from her original loading port in a condition unfit to meet a hurricane which it is known she will encounter, she has not fulfilled the requirements of the Harter Act. This is obvious, but quite irrelevant here.

The libelant has also laid stress upon the *Elkton,* 49 Fed. (2d) 700. That case held merely that, when a vessel left her loading port in a condition amounting to unseaworthiness, the shipowner was liable for loss proximately resulting from that unseaworthiness.

The respondent's position is supported by the case of the *Oritani,* 40 Fed. (2d) 522, aff'd 54 Fed. (2d) 1075, quoted at page 27 of the petitioners' brief. That case states that, where the shipowner is not entitled to the benefit of the Harter Act because of his own act (a long acquiescence in a known improper practice), "to recover on this theory it would be necessary to show, first, *that the practice in question was the proximate cause of the loss.*"

So here, if the respondent did anything at Bremen which was outside the shield of the Harter Act, the petitioners must begin by showing that the respondent's act "was the proximate cause of the loss." The Commissioner and both Courts below have found directly the contrary.

Nor is there any justification for saying that, if the shipowner intervenes in person at a port of call, that fact causes the voyage to begin anew for the purposes of the Harter Act and imposes on the owner the obligation of complying a second time with the terms of the Act. If the ship is seaworthy on original sailing, or if due diligence has been exercised to make her so, the owner becomes entitled to the exemptions contained in Section 3 of the Harter Act, *throughout the voyage.* The Act makes its requirements as of the time and place when the ship breaks ground. It cannot, by judicial construction, be made to repeat those requirements at other times and places.

It is surprising that the petitioners suggest (brief, p. 32) that the case of *United States* v. *American Trading Co.*, 66 Fed. (2d) 617, is authority for the proposition that

> "where a voyage is by stages, the owner must fulfill the condition of the third section of the Harter Act at the beginning of each stage."

That was a case of voyage in stages, where the vessel sailed without sufficient fuel for her entire voyage, and where, therefore, she had to take fuel at a port of call. She did not take enough fuel and therefore was unseaworthy *ab initio,* on the familiar doctrine. It was solely with reference to the question of fuel that the Court said that it was her duty to be seaworthy at the beginning of each stage. When a vessel is seaworthy on original sailing, save in one respect, such as fuel, which is to be supplied at a port of call, her owner's duty under the Harter Act is merely to supply, at the port of call, the deficiency which existed when she originally sailed.

The doctrine of voyage in stages is a relaxation, not a stiffening, of the warranty of seaworthiness.

> *The Steel Navigator,* 23 Fed. (2d) 590, 592 (C. C. A., 2d Cir.).

Just the contrary would follow from the petitioners' contention. According to it, every time a vessel called at a coaling port, the full requirements of the Harter Act would have to be met all over again.

The question is wholly academic. The *American Trading* case was one of voyage in stages, and this is not such a case.

SIXTH.

Unseaworthiness or lack of diligence in some detail having no causal relation to the accident does not affect the applicability of Section 3 of the Harter Act or of the Jason clause.

This question is discussed because the petitioners have argued it, but it is believed that it does not arise for decision in the present case.

The *Isis* fulfilled the requirement of initial seaworthiness. The charge of unfitness because of the alleged 5° rudder bend comes up in connection with the call at Bremen and, as shown in the last point, the legal question arising is not whether a failure in seaworthiness or diligence *at the loading port* deprives the shipowner of the benefit of the Harter Act, irrespective of causal connection; it is, Did the shipowner do a negligent act at the port of call which caused damage?—and if so, can he set up the Harter Act as a defense in respect of that act? Both Courts below have answered the first of these questions in the negative, and the second therefore becomes academic. Moreover, even if the owner could not rely on the Harter Act as regards his own personal error, as already shown he would not therefore forfeit it as regards independent errors of the pilot.

Nevertheless, the broader question will be discussed briefly.

Section 3 of the Harter Act provides that, if

"the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied,"

then he shall not be liable for damage resulting

"from faults or errors in navigation or in the management of said vessel."

The petitioners stress the words "in all respects," and insist that it is a condition precedent to exemption that the owner shall prove diligence "in all respects" and therefore, if there has been a failure in *any* respect, whether or not causally connected with the loss, the condition has not been fulfilled.

That is, perhaps, the meaning of the words, if read in a strictly literal and mechanical sense. But, (1) the practical results would be preposterous and utterly destructive of the statute; (2) Congress could not have intended the statute to accomplish absurd and illogical results and, on familiar principles, this Court will not so construe it; (3) the better considered cases in which the subject has been discussed have refused to accept the arguments now advanced by the petitioners, and have held, in effect, that the words "in all respects" mean "in all respects material to the case."

1. The construction of Section 3 advocated by the petitioners would give absurd results and would in effect nullify the Act.

The Commissioner's discussion of the subject (R. 516-520) is excellent. A few illustrations will show the extraordinary and highly technical character of the petitioners' position.

Suppose that a ship strands or is in collision by reason of the master's error in navigation. Her owner claims the benefit of Section 3 of the Harter Act, and gives general proof that she was seaworthy, etc., at the time of breaking ground on the voyage. In the course of the testimony it appears that, when she broke ground, (1) one of her winches was out of order; or (2) a hatch cover had a crack in it; or (3) a rivet was loose in her after deck; or (4) one of the guys supporting her funnel was worn; or (5) she had one less messboy than required; or (6) she had some deficiency in her equipment—such as hawsers, life preservers, etc.; or (7) she

had, in some particular, less food supply than she should have had, or had no lime juice for a long voyage. The deficiency did not have the remotest connection with the stranding or with the collision or with the consequences of either. Yet the petitioners would deny her owner the benefit of the Harter Act if any one of these defects existed. To produce such absurdities by a slavish adherence to literal wording violates all principles of sound and intelligent construction.

This conclusion is reached also in Mr. Frederick Green's article "The Harter Act," 16 Harvard Law Review 157, where the learned author, after considering a similar illustrative case, concludes (p. 167):

"The proviso is whimsical, if for such an irrelevant incident it excludes the owner from an exemption he would otherwise receive."

The shipowner has the burden of proving due diligence or actual seaworthiness at breaking ground. Under the petitioners' view, in order to sustain his burden, he would have to prove diligence, or actual seaworthiness, with respect to every one of the thousands of details of the ship's construction, manning, equipment and supplies. The libelant would be entitled to cross-examine as to every rivet, every rope, every article of equipment and provisions, and every member of her crew. If he could find any deficiency, no matter how completely unrelated to the accident, Section 3 of the Harter Act would not apply. There never has been a perfect ship, any more than there has been a perfect house or a perfect man. Some detail is always open to criticism. But such refinements, which might have appealed to the mediaeval schoolmen, are impossible in practical affairs and the Harter Act should not be nullified by them.

If a blindly literal construction of the Harter Act were to be adopted, then a shipowner who had failed in due diligence as regards some wholly irrelevant detail would be liable for losses caused by any of the other events for which the Harter Act gives exemption, such as "acts of God, or public enemies, or the inherent defect, quality, or vice, of the thing carried"; "insufficiency of package, or seizure under

legal process"; "any act or omission of the shipper or owner of the goods." If this were so, the position of the shipowner would be far worse than it was before the Harter Act was passed.

The petitioners' contention is that principles of cause and effect must be abandoned in dealing with the Harter Act.

The petitioners (brief, p. 10) say:

"The very structure of the third section of the Harter Act clearly indicates that no causal connection need exist between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made a condition of exemption in respect of negligent navigation."

This shows whither the petitioners' contention leads. It leads them to say that Congress has given exemptions upon certain arbitrary conditions which have no relation, in logic or in reason, to the exemptions. Any construction which involves such a conclusion must be erroneous. In fact, there is the closest causal relation between the condition and the exemption. The condition requires due diligence to make the ship seaworthy and properly manned, equipped and supplied. These requirements are most intimately connected with proper navigation and management, perils of the sea, etc. Indeed, they are absolute essentials. Failure to fulfil them is the direct cause of errors in navigation and management and of injury by sea perils. If the captain is incompetent, if the compass is defective, if the engines will not reverse when ordered, if the whistle cannot be blown in fog, if the ports cannot be securely closed, if the valves of the tanks are defective, the ship will not, and cannot, be properly navigated or managed, and will be injured by sea perils. The theory of the Act is that the shipowner must use due diligence to furnish a ship which can be properly navigated and managed and men who are capable of doing so. The condition is most directly related to the exemption.

An important argument is derived from the history and purposes of the Harter Act. Under the law of England and

of other countries, a shipowner was permitted by contract to exempt himself from liability occasioned by his negligence or by the negligence of his agents. Under the law of this country, this was not permitted. One of the purposes of the Harter Act, as stated by this Court in the *Jason,* 225 U. S. 32, at 53, was to give the shipowner, within certain limits, the same position which the foreign law gave him. The limits imposed were, first, that the shipowner must use due diligence to make the vessel seaworthy and properly manned, etc.; then, that the exemption should extend to perils of the sea, errors in navigation or management and certain other matters. This was remedial legislation, intended to extend the relief afforded the shipowner, and it must be liberally construed so as to effect that purpose.

It must also be construed in the light of the general maritime law. It is settled in England that unseaworthiness, even if a breach of the warranty of seaworthiness, does not render a shipowner liable for damage to cargo, if the damage was not caused by that unseaworthiness.

> *The Europa,* 1908 Pr. Div. 84, 97;
> *Kish* v. *Taylor,* 1912 App. Cas. 604, at 616;
> *Elder, Dempster Co.* v. *Patterson,* 1924 App. Cas. 522, at 536 and 549.

The law of this country is the same. *The Malcolm Baxter, Jr.,* 277 U. S. 323, 331. Therefore, where the parties have made an agreement for exemption with respect to losses caused by perils of the sea, unseaworthiness is immaterial unless it contributed.

In the *Jason,* 225 U. S. 32, at 53, this Court said:

"This language is laid hold of as indicating that the decision proceeded upon the ground that Congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that Congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation."

The Act is an extension, not a limitation, of the shipowner's exemption.

This Court also said (p. 51) that, by the Harter Act, Congress had

"rendered such agreements unnecessary by repealing the liability itself."

That indicates that the intent was to assimilate the new statutory exemption to the old contractual one. In the case of a contractual exemption with respect to perils of the sea, non-contributing unseaworthiness is immaterial. By the statute, Congress has "rendered such agreements unnecessary." Surely, therefore, the rule is the same under the statutory exemption with respect to perils of the sea.

But the Harter Act gives exemption with respect to several matters: one is perils of the sea, another is error in navigation or management. They are dealt with in the same clause. Surely the rule must be the same as to both, that non-contributing unseaworthiness is not material.

The respondent's position is that the shipowner's duty is to give general proof of seaworthiness or due diligence on breaking ground, and proof of seaworthiness or diligence in all respects *relating to the accident.*

2. A statute should not be construed so as to bring about unreasonable results if any other construction is possible.

In *United States* v. *Katz,* 271 U. S. 354, this Court said (at 357):

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

There it was held that an act making it a crime for *any person* to sell liquor without making a record of the sale applied only to dealers licensed under the Prohibition Act.

In *Hawaii* v. *Mankichi,* 190 U. S. 197, the subject was fully discussed. The resolution of annexation of Hawaii provided that its laws should continue in force, in so far as not contrary to the Constitution. It was held that this was

not to be construed to abrogate at once the Hawaiian criminal procedure, even though this procedure did not embody all the constitutional safeguards. This Court, at page 212, quoted with approval from *Smythe* v. *Fiske*, 23 Wall. 374, 380, as follows:

"A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."

The Court also quoted from *United States* v. *Kirby*, 7 Wall. 482, as follows:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In *Heydenfeldt* v. *Daney, Gold, etc. Co.*, 93 U. S. 634, 638, this Court said:

"If a literal interpretation of any part of it" (a statute) "would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act, taken as a whole, it should be rejected. * * *"

See, too:

Church of the Holy Trinity v. *United States*, 143 U. S. 457;
United States v. *Ryan*, 284 U. S. 167.

There is an interesting discussion of the subject in *McGrady* v. *Terrell*, 98 Texas 427. There, a statute governing the sale of school lands made certain provisions as to the sale of "all lands which are now or may hereafter become detached lands." This was construed to refer only to surveyed lands, despite the word "all." The Court, referring to *Bivins* v. *Lessee, etc.*, 15 Ga. 521, said (p. 431):

"The Georgia case is very much in point. The question was as to the construction of a statute which used the word 'all' with reference to levies upon property and upon that

statute the court said: 'True, it says, that in *all* cases where a levy is made, etc. One is amazed, in casting a glance over our statute book, to find how often this form of expression occurs, frequently signifying, as here, not absolutely all—but all, of a particular class, only. Indeed, it seems to be common to all writings—lay as well as legal, sacred as well as profane. And the generality of the phrase is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the Legislature. Here it means, in *all cases* where the claimant is in possession of the property, he shall not be deprived of it, but it shall be left with him.'"

In connection with the Harter Act itself, the courts have shown that they will not adhere to literal wording at the sacrifice of common sense. Section 3 of the Act states that the owner is entitled to certain exemptions if he "shall exercise due diligence" to make the ship seaworthy, etc. Literally, this means that, unless he has used due diligence, he may not have the exemptions, even though the ship were *in fact* seaworthy, etc. But this is not the construction given to the Act. In the *Indrani,* 177 Fed. 914 (C. C. A., 2d Cir.), where a suction pipe broke and damaged cargo, it appeared that the pipe had not been inspected for a year. *No* diligence had been used. But, since the pipe was found to have been actually in good condition, the shipowner was held entitled to the benefit of the Harter Act.

The same view was expressed by this Court in *Int. Navig. Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, 226, where it was said:

"We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of *unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised* * * *." (Italics ours.)

3. The better authority supports the respondent's contention.

It is of course obvious that, under the general maritime law, breach of a covenant of seaworthiness is important only

in so far as it causes the damage complained of. In the *Malcolm Baxter, Jr.*, 277 U. S. 323, this Court held that only damages *proximately caused by the unseaworthiness were recoverable*, and said (p. 331):

"Unseaworthiness * * * displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa* (1908) (p. 84)."

This Court concluded (p. 334):

"* * * that the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469; *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1; *The Indrapura, supra; The Lusitania*, 251 Fed. 715, 732; *The Turret Crown*, 282 Fed. 354, 360."

In the *Turret Crown*, 282 Fed. 354, cited by this Court, in the passage just quoted, on the very subject of causal connection, the ship had trouble with her steering gear almost immediately after sailing, and she finally put back to New York. Part of her cargo was discharged there, and was subsequently injured by an extraordinarily high tide. Other cargo had been damaged through leaks in the bottom of the steamer. Despite the fact that the steamer was unseaworthy as to her steering gear, as to which no diligence had been used (p. 359), Judge Ward held that the unseaworthiness had nothing to do with the loss, and that the shipowner was entitled to defend under the Harter Act, saying (pp. 359, 360):

"But the question is whether this unseaworthiness, whose defects were fully developed before water got into the fuel tanks, contributed to the bottom damage which injured the cargo. * * *

If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerageway did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act.

For the damage to cargo when discharged on Pier B, Jersey City, after the return, which was caused by an extraordinary flood tide, I think the ship is not liable. The proximate cause and the *causa causans* was an act of God—the extraordinary high tide."

On appeal (297 Fed. 766), it was found that the unseaworthiness did directly contribute to the damage, and on that ground the decree was reversed, but the above statement of the law was not criticized. On the contrary, the Court said (p. 782):

"This Court has held that the *Turret Crown* was unseaworthy. Her owners are responsible for all damages resulting from such unseaworthy condition."

In the *Turret Crown*, 284 Fed. 439, another litigation growing out of the same voyage, the Circuit Court of Appeals for the Fourth Circuit referred to Judge Ward's opinion, already quoted, and said (pp. 444, 445):

"If we accept, as we are disposed to do, his findings of the facts in this regard, it would seem to follow, of course, that, there being no causal relation between the unseaworthiness and the damage, no advantage may properly be taken of the former."

In the *Thessaloniki*, 267 Fed. 67 (C. C. A., 2d Cir.), large quantities of water entered a steamer, and she was abandoned and became a total loss. The Court exonerated her owner from liability and said (p. 70):

"We think it quite incredible that a valuable steamer and cargo would have been abandoned within 300 miles of New York, if they were not past saving. However, had this been the case, it would have been an error in the navigation and management of the vessel, for which the owners would not be liable under the Harter Act, if they had exercised due diligence to make her seaworthy.

The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines, and sounding pipes. We may assume them all to be established, and the only result would be delay in the prosecution of the voyage."

It was held that this unseaworthiness, which did not contribute to the loss, did not prevent the owners from relying upon the Harter Act.

The three decisions last referred to were all cited as authoritative by this Court in the *Malcolm Baxter, Jr.*, 277 U. S. 323.

In *Rosenberg* v. *Atlantic Transport Co.*, 25 Fed. (2d) 739, the Court said (p. 741):

"If she was unseaworthy in respect to the chain locker construction, respondents cannot avail themselves of perils of the sea or mismanagement as defenses under the Harter Act, unless they can show that the damage would have occurred *despite the existence of the factor of unseaworthiness* (citing cases)."

The question was squarely decided by the Circuit Court of Appeals for the Second Circuit in *Hartford & New York Trans. Co.* v. *Rogers & Hubbard,* 47 Fed. (2d) 189, 192, known as the *Spartan.* The Court made its decision alternatively, that either (1) the flotilla there involved was seaworthy at the commencement of the voyage, or (2) if unseaworthy, the unseaworthiness had no connection with the loss. The Court held that, on either hypothesis, there was no liability for the cargo damage, and the shipowners were allowed to recover general average. Certiorari was denied by this Court (283 U. S. 835).

In the later decision of the *Elkton,* 49 Fed. (2d) 700, the Circuit Court of Appeals indicated that the matter was still open. In that case, the question did not arise for decision, and the discussion is pure dictum, for initial unseaworthiness was there involved.

Thereafter, in the present case, the Circuit Court of Appeals reaffirmed its decision in the *Spartan* (R. 562; 63 Fed. [2d], at 251).

This Court has indicated that it holds the same view. In the *Wildcroft,* 201 U. S. 378 (*supra,* p. 15), this Court, in affirming a decree in favor of the shipowner, said (p. 387):

"As we understand the findings of both the District Court and the Court of Appeals, the testimony in this regard introduced by the shipowner was sufficient, in the judgment of those courts, to establish that the vessel was seaworthy *in the respects involved,* and that an inspection had been had, and the valves and connections, *the negligent use of which was productive of this injury,* found in due order at the beginning of the voyage. This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive." (Italics ours.)

Of the cases cited by the petitioners, the *Willdomino,* 300 Fed. 5, does contain language tending to support the petitioners' view; but, when the case reached this Court, it was decided on wholly different grounds (272 U. S. 718).

The *River Meander,* 209 Fed. 913, a decision in the District Court in New York, was overruled by the later decision of the Circuit Court of Appeals in the *Spartan* (p. 59, *supra*).

In the *St. Paul,* 277 Fed. 99, a ship which had only coastwise papers, loaded cargo for a foreign voyage, which she could not lawfully make and for which she was consequently unseaworthy. She was libeled for repairs and other claims, remained in the Marshal's custody for many weeks, and finally caught fire and sank. The District Court held, quite correctly, that she had violated her contracts of carriage and was liable; and that the Harter Act was no defense, pointing out that the Act's exemption from losses arising from "seizure under legal process" did not permit her to claim exemption for her own breach of contract. There, her very unseaworthiness in respect to papers made it impossible for her to carry out her contract. The Court said (p. 107);

"When, therefore, in this case, the marshal seized the vessel, it still remained the duty of the owner to carry out his contract of affreightment. This, by virtue of his own wrong, he was at no time able to do."

Obviously, he could not defend under the Harter Act. His own violation of it caused his inability to sail.

The petitioners cite *In re O'Donnell,* 26 Fed. (2d) 334, and the *R. Lenahan, Jr.,* 48 Fed. (2d) 110, cases where cargo on barges in tow of tugs was damaged, in one case by collision and in the other by stranding, and where it was held that tug and tow were one vessel for purposes of the Harter Act, and that the proof as to seaworthiness or due diligence must cover both. These decisions are correct but irrelevant. In both, the suits were for damage to cargo, and questions of the soundness of the barges and of their proper manning and equipment might well play an important part in the liability. These cases were both in the Second Circuit, where the law on the subject under discussion has been settled by the *Spartan,* 47 Fed. (2d) 189, a decision of the same Court which decided the *O'Donnell* and the *Lenahan* cases.

Reference is also made to *Louis-Dreyfus et al.* v. *Paterson,* 43 Fed. (2d) 824, where cargo was carried from the port of loading to a port of transshipment and thence transferred to another vessel which stranded. The Court's remarks appear to be dicta; but it would seem that the view that, where two vessels act as connecting carriers and the second strands, it is necessary under the Harter Act to prove seaworthiness on the part of the *first* vessel, which has performed her part of the carriage and has safely delivered the cargo to the second vessel, is not a reasonable view. In fact, however, the Court did not express this view; it merely said (p. 826) that, if the connecting vessels were regarded as one for the purpose of arguing that the voyage was to or from a port of the United States, then it would follow logically that the seaworthiness of both would have to be proved.

The District Court decision of *Merklen* v. *Johnson & Higgins,* 3 Fed. Supp. 897, is based upon a quite unjustifiable attempt to distinguish between the meaning of the language of the Jason clause and the meaning of the very same language in the Harter Act (p. 10, *supra*).

In the *R. P. Fitzgerald,* 212 Fed. 678, the Court held merely that, since a compartment where kerosene was to be kept was so constructed that the kerosene could leak on the cargo, if it escaped from the can, the vessel was not seaworthy.

There was causal connection. The Court said that the question was one of seaworthiness, rather than of "relative operating causes," but nowhere suggested that the Harter Act would have been inapplicable if there had been no connection whatever between the unseaworthiness and the damage.

The *Indien,* 1933 Am. Mar. Cas. 1342, was a case in which the Court correctly held that the shipowner had the burden of proof as to due diligence and declined to speculate on the consequences of overloading a vessel.

The shipowner must give proof of initial seaworthiness or of due diligence, but, if it appears that there was some detail in which his ship was not perfect but which did not contribute to the accident, it would be quite unreasonable to deprive him of the protection of the Harter Act.

It is urged that every consideration of reasonable construction of the statute supports the respondent's contention; and that it is also supported by the weight of authority, including the expression of this Court, quoted above (pp. 59, 60), in the *Wildcroft,* 201 U. S. 378.

SEVENTH.

The decree below should be affirmed.

New York, November 9, 1933.

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APPENDIX A.

The evidence fully supports the concurrent findings below that the stranding was caused by the pilot's negligent navigation.

The *Isis* left the point indicated on the chart, Exhibit 9, near kilometer 6, at 2.11 A. M. (R. 75). She passed the upbound vessel, at about kilometer 17, at 3.40 A. M. (R. 65, 77). Consequently her average speed was about 7½ kilometers, or, as the master thinks (R. 64), about 8 kilometers, over the ground. This equals about 4.3 knots. There was a flood current of some 3 kilometers (R. 64), and the speed through the water was therefore about 11 kilometers or 5.9 knots.

The engine maneuver book is in evidence as Exhibit 7. A translation of the entries for the material period is printed herein as Appendix B (pp. v-vi). The original pages are reproduced in the record, but, unfortunately, bound in the wrong order. The correct order of the pages is 496C, 496B, 496A.

The river curves to port at kilometer 17. When the *Isis* was near kilometer 16, she saw, around the bend, another steamer bound up (Krueger, R. 65). Instead of checking the ship's headway and passing this steamer in the straight reach, the pilot continued at the same speed, which, as the Commissioner justly says (R. 515), was probably more than the average had been up to that time. The maneuver book shows that, for four minutes preceding the passing of the other steamer at 3.40, both of the ship's engines were going either slow or half ahead (transcript of maneuver book, p. vi, *infra*). The master of the starboard tug testified before the Seeamt (Zey, R. 466) that his tug's engines were going full ahead until they were passing the steamer. Klaasen, master of the port tug, testified before the Seeamt (R. 466) that his engines were going full ahead when the steamer was passed, and his testimony in this case (R. 179) was:

"The engines were left at full speed for the whole time until the opposite steamer came up."

In order to pass the other steamer, the pilot directed the course of the *Isis* to starboard. For this purpose, he reversed the engines of the starboard tug at full speed (Zey, R. 466) keeping those of the tug on the port side at full ahead. Klaasen testified (R. 179):

"Q. How were the engines on your tug working when you passed the steamer? A. Full speed ahead."

With one tug going full ahead and the other full astern, the ship of course swung sharply, and, as she swung, the strong up-current struck her on the port bow, especially since the river was then curving to port. She was carried close to the bank—"too close" (Krueger, R. 66).

The tugs tried to straighten her up (R. 66, 112, 465, 466) but could not do so because she was "smelling the bank," as Captain Davis, a highly qualified expert, testified that ships are apt to do when they get too close (R. 418):

"By the Commissioner.

Q. What is the effect of a steamer going down a river such as this getting too close to the bank at the edge of the channel? A. Well, to use a sailor's phrase, she smells the bank and goes right for it."

The steamer continued to get closer to the bank on the Lesum, or starboard side, and the starboard tug let her lines go to avoid being crushed.

Krueger (R. 66):

"A. Well, when we came close to the Lesum bank, we were so close, he (the starboard tug) couldn't get clear of that bank so he let go his lines and went away.

Q. That left you then with only the port tug and the tug ahead? A. Yes.

Q. What did they do? A. Well, they tried the best they could but they couldn't get us back to the center of the channel."

Therefore, the starboard tug was lost when she was most needed.

Just below was a buoy, on the starboard edge of the channel. The pilot was afraid to use his starboard engine, fearing that the propeller would get entangled in the buoy chain. Consequently he stopped the starboard engine (Krueger, R. 67, and see R. 102).

All this time the leading tug was pulling sharply off to port in an attempt to straighten the ship out, and the port tug was reversed, but, as the tug master testified (Seeamt, R. 465, 466), the ship would not come back, but kept turning farther off towards the Lesum until she ran ashore on the point separating the two rivers.

Captain Krueger testified that he passed the upbound steamer about one-quarter of a mile from the point of stranding (R. 121). The captain's testimony was approximately correct; measured on the chart, the distance is shown to be about 2,000 feet—not 2,400 feet or 4/10ths of a mile, as stated in the libelant's brief.

The entire maneuver was bungled. The *Isis* ought not to have undertaken to pass the upbound vessel on the bend in view of the tidal conditions. The testimony shows—and, indeed, it is obvious without testimony—that it would have been perfectly simple for the tugs to check the steamer's headway and to hold her in position against the flood tide on the straight reach until the upbound vessel had passed. In the case of the *Royal Mail Steam Packet Co. v. Com. Lloyd Brasileiro,* 50 Fed. (2d) 207 (aff'd without opinion, 55 Fed. [2d] 1082; cert. denied, 287 U. S. 607), in the River Scheldt, a local regulation required precisely this maneuver and the steamer was held in fault for not obeying it and holding back so as to pass in the straight reach. This would have been the prudent way to handle the situation, no matter whether the ship was using tugs or had her own rudder (Krueger, R. 68, 69, 97; Davis, R 402, 403; Huseby, R. 429). The experts Captain Davis and Captain Huseby both point out (R. 402, 428, 429) that a ship can be handled in such a maneuver at slow speeds by tugs much better than by her own rudder. If this course had been adopted, there would have been no trouble.

It is obvious that it was bad judgment to sheer the ship close to the starboard bank where the river was curving to port and where the current would necessarily strike her on the port bow, and cause her to continue to sheer. It is not at all surprising that, when the ship got close to the bank, she would not come back; and when, a few moments later, the starboard tug cast off and the starboard propeller could not be used, the situation became hopeless.

It was not necessary for the pilot to navigate close to the bank at all. The *Isis* and her tugs together were about 100 feet wide. The channel was 100 meters, or about 320 feet wide. If the pilot had left 75 feet between the starboard bank and his starboard tug, that would have left 145 feet for the upbound steamer, which would have been more than ample.

The pilot should also have reduced his speed down practically to nothing. The head tide would have given him ample steerageway, even if he had been making no headway over the bottom.

The pilot also neglected to use the ship's engines properly. As the maneuver book shows, he never put the starboard engine full ahead—the obvious method of turning the ship back to port. The port engine was reversed momentarily at 3.40, but after that was not reversed again until 3.46, and was not reversed at full speed until 3.50, after the ship's stern had already struck and very shortly before she brought up.

In narrow channels against a strong current, ships must be handled properly when rounding a bend, and failure so to handle them has always been held to be negligent.

> *The City of Birmingham*, 138 Fed. 555, at 556;
> *Christie* v. *Fave SS. Co.*, 159 Fed. 648, at 650;
> *The Polynesien*, 10 Pr. Div. 28, at 34.

As Captain Krueger points out (R. 69), precisely the same result would have followed from such navigation even if the *Isis* had had the full use of her own rudder.

It seems unnecessary to argue the facts more fully. There is not the slightest basis for questioning the findings of the Commissioner and of the two Courts below on this subject.

APPENDIX B.

Translation of Engine Maneuver Book.

ISIS BELL BOOK

February 10, 1928

A. M.	*Port Motor*	*Starboard Motor*
	* * *	* * *
2.10	Reverse half. Stop.	Ahead slow.
2.11	Ahead slow.	
2.12	Stop.	Stop.
2.15	Reverse half.	
2.17	Stop.	
2.18		Reverse slow.
2.19		Stop.
2.22	Reverse slow.	
2.23	Stop.	
2.24	Ahead slow. Stop.	
2.25		Ahead slow.
2.26		Stop.
2.27		Ahead slow.
2.28		Stop.
2.29		Ahead slow.
2.30		Stop.
2.32		Ahead slow. Stop.
2.35		Ahead slow.
2.36		Stop.
2.37		Ahead slow.
2.38		Stop.
2.39		Ahead slow.
2.40	Ahead slow. Stop.	Stop.
2.41		Ahead slow.
2.42		Stop.
2.42		Stop.
2.43	Ahead slow. Stop.	
2.44	Reverse half.	Ahead slow.
2.45	Stop.	Stop.
2.46	Ahead slow. Stop.	
2.50		Ahead slow.
2.51		Stop.
2.53	Ahead slow. Stop.	
2.54		Ahead slow.

A. M.	*Port Motor*	*Starboard Motor*
2.55		Stop.
2.57		Ahead slow. Stop.
3.4		Ahead slow. Stop.
3.8		Ahead slow.
3.9		Stop.
3.12		Ahead slow.
3.13		Stop.
3.14		Ahead slow.
3.15		Stop. Ahead slow.
3.16	Ahead slow.	Stop.
3.17	Ahead slow. Stop.	Reverse slow. Stop.
3.18	Reverse full. Stop.	Ahead slow. Ahead half. Stop.
3.20	Ahead slow.	
3.21	Stop.	
3.25	Ahead slow. Stop.	
3.26		Ahead slow. Stop.
3.27		Ahead slow. Stop.
3.32	Ahead slow. Stop.	
3.33		Ahead slow.
3.34		Stop.
3.35		Ahead slow.
3.36	Ahead slow.	
3.37		Ahead half. Ahead slow.
3.39		Ahead half. Ahead slow.
3.40	Stop.	
	Reverse half. Stop.	Ahead half.
3.41	Ahead slow.	Ahead slow. Ahead half.
3.42	Stop. Ahead slow.	Ahead slow.
3.43	Ahead half	Ahead half.
	Ahead slow.	
3.45	Stop.	
3.46	Reverse half.	
3.47	Stop. Ahead slow.	Ahead slow.
3.49	Stop.	Stop.
3.50	Reverse full.	Ahead slow.
3.51		Stop.
3.53	Stop.	Reverse full. Stop.

* * * * * *

APPENDIX C.

The alleged bend in the rudder blade had no effect on the navigation of the *Isis*.

Undoubtedly the Commissioner was right (R. 523-524) that by far the most qualified witnesses on this subject were the three experts called by the respondent. Captain Davis is constantly dealing with such questions from the standpoint of the practical handling of vessels; Mr. French is constantly doing so from the standpoint of issuing certificates of seaworthiness; and Captain Huseby is constantly handling vessels with tugs, and observing what effect a ship's rudder has when used under such conditions. They all agree that, at the speed at which the *Isis* was traveling—say 6 miles per hour through the water—a 5-degree bend at the tip of her rudder would have no practical effect.

This finding by both Courts below is fully supported by common sense, as well as by the testimony of the experts. Mr. French testified (R. 380, 387) that such a bend would not have any substantial effect upon the navigation. He referred to the case of the steamer *C. O. Stillman*, which navigated for six months with a similar bend of the rudder. It did not have the slightest effect on her navigation, and no one on board knew that it existed (R. 380, 381, 387, 388). The libelant's witness McLennan, refers to similar cases (R. 320, 321). Mr. French is constantly passing on questions of seaworthiness and is as competent as any man in the world.

At R. 395:

"I don't think, with a loaded ship like that, 5 degrees would have affected anything going down with those two boats steering at the speed the ship would be going."

He testified (R. 391, 395, 396) that he would not have hesitated to give the *Isis* a certificate of seaworthiness to proceed with the three tugs, and said:

"I don't think 5 degrees would interfere any at all."

This was especially true of the *Isis*, with her powerful tugs and her twin screws.

Captain Davis, whose qualifications no one has questioned, testified that he considered the vessel safe for the trip (R. 400, 402) and that, if there were a bend in the rudder which affected the steering of the ship, her navigators would have discovered it before she had proceeded any substantial distance (R. 412, 417), "as soon as they had the speed on the ship they were going to navigate it (at)" (R. 414).

Captain Huseby testified (R. 432, 433) that he considered the ship fit and (R. 451) that such a bend in the rudder

"would not make any difference in my opinion, in my opinion it would not make any difference."

He testified that a ship has to have 3½ or 4 knots of speed before the rudder will affect her at all (R. 453-454):

"You can go along with say 3½, that is just about steerageway, then you have to have your wheel hard over before she answers at all, so in my opinion, say 5 or 6, 8 or 10 degrees, it would be so little you couldn't feel it, of course, it all depends how fast your ship is going. * * *"

If she were going at 8 kilometers, or between about 5 knots, "it would not affect her" (R. 454). At 6 knots, she would have to have 10 degrees of helm before she would feel it (R. 454).

The petitioners' witness McLennan (R. 320, 321, 322) admitted that, if the rudder were bent enough to affect the steering, it would be noticed. The petitioners' witness Jordan admitted that, if the boat had been navigated for several miles without trouble, it would show that the rudder was all right (R. 352). The petitioners' third expert, McGregor, admitted that a bend

"under 5 (degrees) I would not consider worth noticing very much" (R. 358).

The Commissioner heard and saw the expert witnesses on both sides. Basing his opinion partly on the personal impression made on him by the witnesses, he accepted the opinion of the respondent's experts.

No one can read the account of the way in which the ship was swept by the current and believe that a minute bend in the bottom of the rudder, even if it existed at the time, had anything to do with it. There was no difficulty in steering the ship going down the river (pp. 32-33, *supra*); she did not tend to sheer to starboard; and there was no trouble whatever, until she was intentionally and negligently swung to starboard at the beginning of the river bend, so that the current came on her port bow, and she then lost the benefit both of her starboard tug and of her starboard propeller.

The petitioners argue that two of the respondent's witnesses admitted that they would not have allowed the vessel to sail if they had known of this bend. The testimony in question has been misinterpreted.

Captain Reichenbacher, the marine superintendent, testified merely that, generally speaking, he would not allow a ship to sail with a bent rudder. His evidence was (R. 254):

"Q. Are you satisfied from your examination that the rudder blade was straight? A. Yes. I would never undertake a thing like this if I knew the rudder blade was bent. I would not have ordered her to be sent to Hamburg if the rudder blade was bent. I would have ordered her to be put into dry dock at Bremen."

That is a long way from being a statement that a 5-degree bend at the tip of the rudder was a dangerous thing.

Captain Krueger testified that he examined the rudder and found it straight. At R. 94, 95 he was asked by petitioners' counsel:

"Q. If you had known that the rudder had the bend, at the time you left Bremen, which was later discovered at the time it was in drydock after the second stranding, I take it that you will agree with me that you would not have sailed? A. No.

Q. The reason why you did sail from Bremen with your rudder lashed and with the use of your tugs and your ship's engines was based on the belief that the blade of the rudder was straight and in no way bent? A. Yes."

These last two answers, consisting of only "no" and "yes," can hardly be said to prove that a 5-degree bend at the extreme tip of the rudder would have made the *Isis* unfit to tow.

The same argument was made to the Commissioner. He said (R. 524-525):

"My own inference from this evidence is that these two witnesses merely overdid an effort to establish a character for caution. In spite of what they say, it is extremely difficult to believe that they really would not have sent the *Isis* on her voyage under tow, even if they had known of a 5° deflection in her rudder blade."

Moreover, even if, through an excess of caution, the witnesses would not have sent the vessel out with a 5-degree deflection at the tip of the rudder, it does not follow that such a deflection would have been dangerous. Neither Reichenbacher nor Krueger said that there would have been any danger about it, especially with the twin screws and powerful tugs, capable, if properly navigated, of handling the ship with the utmost ease; and the expert evidence makes it abundantly clear that there was no danger. The trifling deflection of the blade, even if it existed at the time in question, was of no more importance than a scratch in the paint would have been. The petitioners are catching at a straw.

The findings below that the bend, if present, was of no consequence, based, as they are, on adequate evidence, are conclusive here.

INDEX.

	Page
I. Competence of Pilot	1
II. The Findings Below as to the Rudder	2
III. The Harter Act	4

TABLE OF CASES.

Jason, The, 225 U. S. 32	5
Louis-Dreyfus v. Patterson Steamships L't'd. (not reported)	4
Spartan, The, 47 Fed. (2d) 189	4
Thessaloniki, The, 267 Fed. 67	4
Turret Crown, The, 282 Fed. 354, 297 Fed. 766	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 80.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY, OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

I.

Competence of the Pilot.

Since the petitioners' reply brief argues this question further, three comments should be briefly made.

1. No question on this subject is presented by the record. The Commissioner found (R. 535) that the *Isis* sailed "under the direction of a properly selected local pilot." No exception was taken to this finding in the District Court.

No error was assigned in this respect in the Circuit Court of Appeals. Therefore, it is submitted, the question is not raised on the record. The argument now suggested by the petitioners seems an afterthought.

2. It is not clear what greater care could have been exercised in selecting a pilot than to take one familiar with the ship, of long experience on the river, and recommended by the Chief Pilot as the best man for the purpose (R. 161). The fact that the pilot has since died made it impossible to call him to give further details of his experience.

3. It is suggested that the earlier accident to the steamer indicated that the pilot was not competent. There is not a word of evidence tending to show that he was responsible in any way for the first accident. Since that accident was not an issue in the present case, it was not gone into in any detail in the evidence, but the Seeamt (R. 476) found that it was unavoidable, and that "no fault attaches to anyone."

II.

The Findings Below as to the Rudder.

The petitioners say (reply brief, p. 9) "There is certainly no finding below that it" (the bend in the tip of the rudder) "did not physically contribute to some extent." This statement, it seems, is directly opposed to the findings below. The Commissioner said (R. 512):

> "If there was any bend in the rudder or anything else which affected the steering of the *Isis*, it would seem obvious, and the expert evidence is, that any competent navigator could not fail to have discovered some indication of it by the time the vessel had gone half a mile or at least had reached her full towing speed of 7 or 8 kilometers."

At R. 513, he finds that the engine movements on the *Isis* supported the direct evidence from her officers that there was no tendency to sheer on the way down the river.

At R. 533, he finds:

> "The injury consisting of a 5° set in the rudder blade was not a contributing cause of the second stranding."

At R. 516, he finds that "unseaworthiness, if any, in respect of the steering gear of the *Isis* did not cause or contribute to the stranding."

At R. 525, he finds that the deflection in the rudder blade, if it existed, did not render the *Isis* unseaworthy.

At R. 534, he finds that she was seaworthy, whether or not the deflection then existed.

The District Court confirmed these findings in its opinion (R. 545, 546) and in its formal order (R. 547).

The Circuit Court of Appeals said (R. 561):

> "The bend in the rudder was found to be about 5° and, assuming that this existed due to the first stranding and was not repaired at Bremen, still it would not account for the second stranding * * * before the Commissioner, where both parties had full opportunity to examine, it was established that it had no effect upon the navigation of the vessel. If there were a bend in the rudder the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. * * * It was expressly found that unseaworthiness, if any, with respect to the steering gear of the vessel, did not cause or contribute to this second stranding."

Throughout, the petitioners argue as though the whole rudder had been bent 5°. It should therefore be emphasized that it was only the lower *tip*, and, as argued in the respondent's principal brief (pp. 26-28), it is probable that this bend occurred at the second stranding. Even if it was present when the *Isis* left Bremen, no one can seriously suggest that it would have had any practical effect; and the findings below on this subject are supported by overwhelming evidence (Respondent's principal brief, Appendix B, VII to X).

The reply brief says (p. 9) that the Seeamt "is not analogous to our local Inspectors, but is a Court of Admiralty." Evidently the petitioners have overlooked the agreement on this subject appearing at R. 207, as follows:

> "It is further agreed that the Seeamt is not a Court for the determination of litigated controversies, but is a body created to investigate marine disasters with certain disciplinary powers."

This, it is submitted, is precisely analogous to our Local Inspectors.

That the Seeamt confused the trip up the river with the trip down is sufficiently argued at pages 35-36 of the respondent's principal brief. The findings below sustain the respondent's position on this subject. The inaccuracy of the Seeamt's report in this and other respects may be explained by the fact that it appears to have been a rough draft "its phraseology subsequently to be put into a more definite language." (R. 468.)

III.

The Harter Act.

1. Undoubtedly there is a difference of opinion in the Second Circuit Court of Appeals on the subject of causal relation. The three judges who sat in the *Louis Dreyfus* case hold one view. The three who sat in the case at bar hold another. The latter view has also the support of Circuit Judge Ward, who decided the *Turret Crown*, 282 Fed. 354, in the District Court as well as of the three judges who decided that case on appeal (297 Fed. 766) and of those who decided the *Thessaloniki*, 267 Fed. 67, and the *Spartan*, 47 Fed. (2d) 189. (Respondent's principal brief, p. 58.)

2. The petitioners admit (reply brief, pp. 2, 3) that unseaworthiness not causing damage is immaterial in cases of contractual agreements for exemption from liability, as well as in cases of suit for breach of warranty of seaworthi-

ness. This result in reasonable and in consonance with general principles of law. What justification is there, then, for applying different principles to the Harter Act, which was intended to "render such agreements unnecessary" (the *Jason*, 225 U. S. 32, 53)?

3. The petitioners do not meet the suggestion that their construction of the Act leads to absurd and unjust results. They say that Congress has conferred a privilege and may impose such conditions as it sees fit. But Congress must have intended those conditions to be reasonable and not "whimsical." If the sea damages cargo by leaking through a crack in a hatch which was present because of the owner's failure in initial diligence, it is reasonable that the owner should not have the protection of the Harter Act; but of the question is one of error of navigation producing collision, it would be absurd that the crack, which has nothing to do with the case, should affect the result. It is, of course, to be understood that the question under discussion relates to defects which *in fact* do not cause the damage.

4. As previously suggested (respondent's principal brief, p. 49), the question does not seem to arise here. The Harter Act had no new application to the ship at Bremen. Even if an error of management was made there, and even if, for some reason, that error was not within the shield of the Harter Act, it is established that that error did not cause or contribute to the accident, and that, it would seem, disposes of the case.

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INDEX.

PAGE

I—The Court's decision that the *Isis* was unseaworthy on sailing from Bremen because her rudder was lashed amidships. 1

II—Proximate cause and the Harter Act. 10

Appendix—The Text of the Harter Act. 19

TABLE OF CASES.

Allie, The, 24 Fed. 745. 9

Barendrecht, The, 9 Fed. (2d) 614. 4
Bluejacket, The, 144 U. S. 371. 16
British King, The, 89 Fed. 872. 14

Cargo per Maori King v. Hughes, L. R. (1895) 2 Q. B. 550. 13
Ciampa v. British India Co., L. R. (1915) 2 K. B. 774. . 13
City of Cleveland, 56 Fed. 729. 6

Dene Steamship Co. v. Tweedie Co., 143 Fed. 854. 13

Elder Dempster & Co. v. Paterson, 1924 A. C. 522. 9
Europa, The, L. R. (1908) Probate 84. 15

Francis Wright, The, 105 U. S. 381. 15

Gilchrist Transportation Co. v. Great Lakes Towing Co., 237 Fed. 432. 4

Highland Star, The, 7 L. L. Rep. 240. 6
Howard Reeder, The, 207 Fed. 929. 5

Indrapura, The, 178 Fed. 501. 14

Kish v. Taylor, L. R. (1912) App. Cas. 604. 15

PAGE

Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397.. 10

Malcolm Baxter, Jr., The, 277 U. S. 323..... 15
Marlborough, The, 47 Fed. 667..... 9

Ohio, The, 91 Fed. 547..... 6
Olympic v. H. M. S. Hawke (1913) Probate 214; (1915) App. Cas. 385..... 6

Phelps v. Hill, L. R. (1891) 1 Q. B. 605..... 7

Queen of the Pacific, 180 U. S. 49..... 16
Queensland National Bank v. P. & O. S. N. Co., L. R. (1891) Q. B. 567..... 13

Ralph Creyke, The, 6 Asp. M. C. 19..... 6

Smith v. Northwestern F. & M. Ins. Co., 246 N. Y. 349.. 16
Southwark, The, 191 U. S. 1.....13, 14
Standard Oil Co. v. United States, 221 U. S. 1..... 17

Tattersall v. National Steamship Co., 12 Q. B. 297.... 13
Thames, The, 61 Fed. 1014..... 14

Upperton v. Union Castle Mail S. S. Co., 8 Com. Ca. 96, 9 Com. Ca. 50..... 14

Varanger, The, 45 Fed. (2d) 608..... 5

TEXTBOOKS.

Carver, Carriage by Sea, 7th Ed.....7, 9, 13
Marsden on Collisions at Sea..... 5
Parsons on Shipping..... 15

STATUTES.

The Harter Act.....3, 10, 11, 12, 16, 19

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 80.

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,

Respondent.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Hamburg Amerikanische Packetfahrt Aktiengesellschaft, by the counsel undersigned, respectfully prays for a rehearing of the above-entitled cause, and, in support thereof, respectfully refers to the following matters:

I.

The Court's decision that the *Isis* was unseaworthy on sailing from Bremen because her rudder was lashed amidships.

The Court's opinion with respect to the above reads as follows (printed opinion, p. 7):

"The fact is undisputed that the rudder, being disabled, was useless as an instrument to control the movement of the

vessel. There is *evidence* that in addition to being useless it was positively harmful by reason of a bend to starboard. These two defects *together* defeat the carrier's endeavor to shift the risk upon the cargo.

The respondent insists that a vessel may be seaworthy though she is navigated by tugs. *No doubt that is true where the rudder is capable of use.* This is far from saying that the risk to the cargo is not appreciably increased if the rudder is out of commission and so incapable of giving aid when an emergency arises. There is no need to go beyond the pages of this record for proof that this is so. Witnesses for the respondent tell us that a vessel with her rudder lashed may be towed without risk if the speed of the tugs is slow, less than seven *kilometers* an hour. They admit that the useless rudder becomes a source of danger if the speed of the tugs is higher, seven *kilometers* or more." (Italics ours.)

The opinion then refers to the findings below that "the *Isis* was proceeding when she sighted the upbound steamer at a speed of more than eight *kilometers* an hour."

The Court has confused kilometers with knots. The evidence of the respondent's witnesses was that the vessel might be towed with her rudder lashed without risk if the speed was less than 7 *knots* an hour—not *kilometers*. The evidence is as follows (Davis, p. 410):

"I think that is perhaps the point where the tugs would be as efficient as the engine (rudder?), say somewhere between 5 and 7 knots. Above that there is no question that the rudder would be more efficient and the tugs less. I say 7 knots would be the dividing line.

Q. Below 5 you would consider the tugs were better? A. Yes.

Q. Between 5 and 7 they are about equal, is that what you have in mind? A. Yes, that is my opinion.

Mr. Haight: Knots?
Mr. Longley: Yes."

The opinion is therefore in error in the assumption that 8 kilometers (which is the equivalent of only 4.316 knots) was more than the speed approved by the respondent's wit-

nesses. Even if the speed through the water, after adding the current, was 11 kilometers, that was the equivalent of only 5.935 knots. That speed was too great to maintain in running close to the bank and passing another vessel, but it was a speed at which tugs were more efficient than a rudder.

The opinion continues (p. 8):

"The speed and the place would in all likelihood have been harmless if she had been navigating the river with her steering gear in order. The carrier sent her forward with her steering gear crippled when there was opportunity to make it sound. No doubt there are occasions when owner and master are left without a choice. The vessel may be disabled at a place where the making of repairs is impossible or unreasonably difficult. In such circumstances she must go her way with such help as can be gathered. Here no emergency was present to excuse the decision that was made. The carrier would have had no difficulty in making the repairs at Bremen. The risks of navigation that are cast by statute upon the owners of the cargo are those that remain after the carrier has done his duty. They do not include risks that would have been avoided or diminished if the vessel had gone out with her equipment staunch and sound. A carrier who chooses for his own purposes to send out a crippled ship with needless enlargement of the perils of navigation will not receive exemption at the cost of the owners of the cargo if the perils thus enlarged have brought the ship upon the sands."

We understand from the above quotation that the Court has decided the following points against the respondent:

(1) That because the rudder was lashed and therefore "useless as an instrument to control the movement of the vessel," the *Isis* was unseaworthy to proceed with the assistance of tugs and her owners must be denied the protection of the Harter Act.

(2) That, even though the fact has been found that the stranding occurred because the *Isis* was navigated at too high a speed and too close to the edge of the channel, nevertheless her owner is deprived of the right to general average con-

tribution because "the speed and the place would *in all likelihood* have been harmless if she had been navigating the river with her steering gear in order."

(3) That "no emergency" existed at Bremen, *because* "the carrier would have had no difficulty in making the repairs" there.

(4) That, since the risks of the trip from Bremen to Hamburg could have been "avoided or diminished" by drydocking and repairing the *Isis* at Bremen, failure to do so was a breach of duty which deprived her owners of the protection of the Harter Act.

(5) That the owners of the *Isis* chose, *for their own purposes*, to send out a crippled ship.

The Court is respectfully requested to reconsider these rulings.

(1) We submit that the fact that the rudder was lashed amidships did not render the *Isis* unseaworthy when accompanied by tugs. In all of the great harbors of the world, it is daily practice to tow steamers from point to point with no steam at all on their boilers, so that their steering engines cannot be worked at all. To condemn this practice is to go directly counter to the usage of practical navigators the world over. Some vessels, in fact, are not equipped with steering apparatus at all and tugs are relied upon entirely for the purpose of steering.

The well-known practice of towing steamers without steering power is referred to in *Gilchrist Transportation Co.* v. *Great Lakes Towing Co.*, 237 Fed. 432 (see middle of p. 435, bottom of p. 437, middle of p. 439).

In *The Barendrecht*, 9 Fed. (2d) 614 (C. C. A., 2nd Cir.), the steamer so named, while being towed from Brooklyn to Bayonne, came into collision with another vessel. At the time of the towage the *Barendrecht* was without steam for power or even to sound her whistle and the Court held that this was not a fault.

Many instances of such towage are referred to in the record in the case now before the Court (R. 165, 174, 175, 177, 198, 208-210, 222-225, 230-232). And the *Isis* was, of course, not without *steering power,* because by maneuvering her twin screws her course could be altered to port or starboard, as occasion might require.

Fourteen witnesses, including eleven familiar with the Weser River, testified that the *Isis* was seaworthy to proceed with the tugs (respondent's principal brief, p. 29). No one testified to the contrary, except three witnesses called by the libelant, only one of whom was a navigator. The opinion, in its finding that the *Isis* was not seaworthy to proceed, ignores the overwhelming weight of evidence, as well as the findings of the Commissioner and of the District Court.

(2) It is submitted that no navigator could know, and that no court can find, that a ship, which has sheered when going too fast in a shallow river, "in all likelihood" would not have done so if, in place of three tugs, she had had the benefit of a rudder in perfect working order. Of course, if the rudder of the *Isis* had not been damaged, she would not have had the assistance of any tugs at all; but, assuming that she had been proceeding with her rudder uninjured, the suction exerted upon a flat-bottomed cargo boat navigating a shallow river, when she runs too close to the bank, is such as to render any rudder inefficient. "Smelling the ground" is a perfectly well-known phenomenon and must always be guarded against when navigating shallow water, and the one way to do so is to run slowly and keep the vessel under control (*The Howard Reeder,* 207 Fed. 929, 934 [C. C. A., 4th Cir.]; *The Varanger,* 45 Fed. [2d] 608, 612). We quote the following from *Marsden on Collisions at Sea* (8th Ed., p. 467):

"In the case of a steamship navigating the Goole reach of the river Ouse, where the water was so shallow that there was risk of her smelling the ground and failing to answer her helm, it was held to be her duty, by occasionally stopping

her engines, to diminish her way, and so be well under control in case of emergency; and she was held in fault for neglect of this precaution" (citing *The Ralph Creyke,* 6 Asp. M. C. 19; *The Highland Star,* 7 L. L. Rep. 240).

A similar difficulty arises when two vessels come in too close proximity to each other. By virtue of the suction so created, a collision is liable to be caused, and in the case of such collisions it has never been possible to prevent them by the use of the ship's rudder (see *Olympic* v. *H. M. S. Hawke,* [1913] Probate, 214; [1915] App. Cas. 385; *The City of Cleveland,* 56 Fed. 729, opinion by Mr. Justice Brown when District Judge; *The Ohio,* 91 Fed. 547, opinion by Mr. Justice Lurton when Circuit Judge).

In the *Olympic-Hawke* collision, the subject of suction was dealt with at length and it was found that the *Hawke* became entirely unmanageable, because of the suction of the *Olympic.* Lord Parker said:

"Further, on the evidence in the Court below, the forces of interaction between the two vessels at a distance of 300 yards would be negligible and could probably be counteracted by helm action *at any distance beyond 200 yards*" (p. 272).

We submit that the evidence in this case clearly proves, as the Commissioner found, that the second stranding of the *Isis* occurred because she was being navigated at improper speed too close to the bank and not because she was herself unfit to make the trip down the river, with twin screws and three tugs assisting her. That being the case, the stranding was not due to the unfitness of the ship. If she had been navigated *at the same speed,* with no tugs, the risk of her becoming unmanageable because of suction would have been far greater, not less.

(3) and (4) We submit that an "emergency" did exist at Bremen and that it was a real and a very practical one. The Hamburg-American Line, as carrier, was bound to consider the interests of its shippers in handling the situation. It

could not fairly destroy a substantial part of the value of the cargo by incurring needless expenditure. If there were two ways of handling the situation, this Court has ruled that the carrier was bound to choose the one which presented the greatest safety, *from the standpoint of navigation*, regardless of cost. We submit that the right rule is that, if there were two ways of handling the situation, both of which were reasonably safe, the carrier should take the one which was the less expensive (*Phelps* v. *Hill*, L. R. [1891] 1 Q. B. 605; *Carver, Carriage by Sea*, 7th Ed., Sec. 291).

The average adjustment which is in evidence (Exhibit 16) in this case shows that the present libelant's cargo was only 48½ per cent. of the total values involved when the *Isis* left Bremen. We submit that the Court has overlooked the fact that all of the *Isis'* hull underwriters and all of the German cargo underwriters who have not sued were consulted before the towage was undertaken and that they agreed that the rudder should be lashed and the ship assisted by tugs. Surely a carrier cannot be charged with a breach of duty towards his cargo if he follows a course which all of the cargo underwriters who are available consider safe and which they prefer, because it will save them a large amount of money. The underwriters of the libelant's cargo were not consulted only because they were unknown and could not be reached within the time available. It is hard to believe that, if consulted, they would have declined to follow the lead of the German underwriters, but suppose that they had declined, what then would have been the result? After consulting all of the hull underwriters and 38½ per cent. of the cargo underwriters, and being advised of their preference, if the Hamburg-American Line had disregarded their wishes and had docked the *Isis* in Bremen and repaired her there, the underwriters who had been consulted would have refused to pay their proportion of a general average stated on *that* basis, and we submit that they would have been justified in claiming that they were not chargeable for the cost of discharging the cargo, storing it, insuring it, reloading it (with all of the attendant risks of damage and the certain loss of interest through

delay), and, in addition, the wages and maintenance of the crew of the ship, all of which would have entered into the general average statement.

The Court, in its opinion, has stated that the risk to the cargo was improperly increased by sending the *Isis* from Bremen to Hamburg in tow. We submit that, if properly handled, the *Isis* was far safer with three tugs than she would have been if navigating under her own steam, but, even if it is thought, *after the event*, that the *Isis* would have been safer if she had proceeded with her rudder in working order, rather than with the assistance of the tugs, the fact remains that this was not the view of the interested parties, when the question was up for decision, and that, in order to repair the rudder, the cargo must have been subjected to both the expense and the risks above referred to.

The choice which had to be made by the Hamburg-American Line and by the hull and cargo underwriters who were consulted was not between two courses, one of which was safe and the other dangerous, but between two alternatives, each of which involved some risk, because of the first stranding, for which, admittedly, the respondent was not legally to blame.

We submit that an owner should not be held to have failed to exercise due diligence if he has sent a diver down and examined the rudder of his ship and received the report that it is fair; if, as an extra precaution, he has docked his ship and exposed the rudder as far as is safe, and has found it fair; if the balance of the rudder has been examined by a straight edge, under water, and has again been reported fair; and if, having reported the facts to his own underwriters and to all the cargo underwriters who are within reach, it has been agreed, as in this case, that the vessel should proceed with the assistance of tugs.

It cannot properly be contended, of course, that the stranding *ipso facto* proved unseaworthiness. Strandings in narrow rivers frequently result from treacherous currents, crowding by other vessels, or negligent navigation. Nor can it properly be said that a vessel is unseaworthy because not in the

highest degree of seaworthiness on sailing. As said in *The Marlborough*, 47 Fed. 667, at p. 670:

"The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety; and she need not be the safest."

As said also in *The Allie*, 24 Fed. 745, at p. 749:

"* * * unseaworthiness is not made out by showing that 'a stouter ship might have survived the peril.' Amies v. Stevens, 1 Strange, 128."

In *Elder Dempster & Co.* v. *Paterson*, 1924 A. C. 522, at 558, Lord Sumner said that "a ship does not become unseaworthy merely because her construction or appliances are not foolproof."

The test is thus stated in *Carver, Carriage by Sea* (7th Ed., Sec. 18), "She (the ship) must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, *having regard to all the probable circumstances of it.*"

The opinion of the Court also refers to the bend of not to exceed 5 degrees in the lower outer corner of the rudder. The Court does not, however, find that this alleged defect, in and of itself, made the *Isis* unseaworthy and the findings below are to the contrary. The Circuit Court of Appeals said (R. 561) that this bend "would not account for the second stranding," and that "it was established" that the bend "had no effect upon the navigation of the vessel."

(5) It is submitted that there is no evidence in this case which justifies the finding that the Hamburg-American Line chose "*for its own purposes* to send out a crippled ship." In fact, the Court states that this was done "to save time and expense to the vessel *and her cargo*" (opinion, p. 2).

As pointed out in our main brief, if the *Isis* had, in the first instance, been held at Bremen for repairs, four-fifths of the entire expense of the repairs and of the discharge, storage and reloading of the cargo would have been paid by the cargo, including the present libelant. In other words, it was chiefly for the benefit of the cargo that towage was decided upon.

II

Proximate cause and the Harter Act.

The general importance of this part of the Court's decision cannot be overstated. Either by the force of the statute, or by special contract, the carrier's liability for practically every pound of cargo carried by sea in the foreign and domestic commerce of the United States is regulated by the provisions of the Harter Act and the construction of that Act affects not only claims for cargo damage but also adjustments of general average. The rule of law which will be established by this case is, therefore, very far-reaching and all of those who are engaged in foreign trade—shippers, consignees, carriers, bankers and cargo underwriters—are vitally interested both in its substance and in its form. Indeed, next only to the importance of the principle to be declared is the importance that its declaration shall be so clear that it can be understood by the interested parties and applied by the lower courts with precision so as to avoid a mass of new litigation.

Before the passage of the Harter Act, all agreements entered into between the carrier and the shipper, which sought to excuse the carrier from liability for the negligence of his servants, were held to be contrary to public policy and void. In this particular our law differed from that of practically every other important commercial country in the world (*Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 447).

In 1893 Congress passed the Harter Act and, by so doing, brought our law more nearly into accord with that of Great Britain and the other commercial nations. The purpose of that Act was two-fold: (1) to maintain, for the benefit of cargo, the rigid obligations of the carrier properly to load, stow and care for the cargo and to make his ship "seaworthy and capable of performing her intended voyage," and (2) to relax the rule which had previously existed as to the carrier's liability for the errors of his servants in the navigation and management of the ship.

For the convenience of the Court, the entire text of the Harter Act is printed as an appendix hereto. Sections 1, 2 and 3 are the only ones which are important in the present discussion, the first two being for the benefit of cargo and the third for the relief of carriers.

It is submitted that these three sections *must be read together*, in order to understand either the sections themselves or the purpose of Congress in enacting them. Section 3 cannot be read alone and, on the face of it, it cannot be construed literally, since such a construction would lead to results which are obviously impossible. Construed literally, it would mean that if the owner of a vessel has *not* exercised due diligence to make her in all respects seaworthy, he will be responsible for the damage resulting from *all* of the causes enumerated in the section. It is submitted, however, as already stated, that such construction is impossible. For instance, if a ship should inadvertently sail from New York for Rotterdam without a chart of the English Channel, she would not be "in all respects properly equipped and supplied," but it cannot be the intention of this Court to hold that, in that event, her owners would be responsible to the shippers if the vessel were struck by lightning, or was sunk by a submarine, or if her cargo deteriorated on the voyage because of some inherent defect, the ship having arrived safely at Rotterdam, without a chart.

Section 3 certainly was not drafted by anyone who understood the technical rules of the maritime law. No skilled draftsman would have grouped together in the same section, and with no separation other than a comma, causes for which a carrier was responsible and other causes, such as acts of God and the public enemies, for which he never had been held responsible even under the most rigid rules of the common law. But while an artistic result was not accomplished, it is submitted that the purpose of Congress was clear and that that purpose was to bring our law into conformity with that of the other commercial nations and to relieve carriers from a liability which had proved to be too burdensome and which it was considered the shippers and the cargo under-

writers should bear. Congress wanted to preserve, intact, the most rigid obligations of the carrier as to providing a seaworthy ship and as to the proper stowage and custody of the cargo. It also wanted to relieve the carrier from cargo damage resulting from errors of navigation and errors in management, *unless that damage had been caused or contributed to by some failure on the part of the carrier to perform his obligations imposed under Sections 1 and 2 of the Act.*

If a vessel sails with an intoxicated harbor pilot, but if she does in fact proceed safely out of the harbor and discharges the pilot, and has a collision ten days after, it seems impossible that her rights under the Harter Act can be affected by the condition of her pilot 3,000 miles back.

We submit that Congress never intended that Section 3 should be construed as a conditional offer, which must be accepted literally as made. On the contrary, Congress intended to grant a reasonable exemption to the carriers engaged in the American trade, so that the obligations of those carriers and the responsibilities of the cargo underwriters would be similar to those incurred in trade with other countries. The decision of this Court, however, grants to American and foreign underwriters who insure cargo bound to or from this country rights against the carriers which are unheard of in any other jurisdiction.

The Court states its construction of Section 3 of the Act as follows (opinion, p. 10):

"The statute, aided by the contract, gives the shipowner a privilege upon his compliance with a condition. If he would have the benefit of the privilege, he must take it with the attendant burden. There would be no end to complications and embarrassments if the courts were to embark upon an inquiry as to the tendency of an unseaworthy defect to aggravate the risk of careless navigation."

This means, as we understand it, that a shipowner may not rely upon the Harter Act if, through any oversight, his ship is not *"in all respects"* seaworthy, even if there is no

possible connection between the unseaworthiness and the loss. This ruling the Court is asked to reconsider.

The term "seaworthy," as used to-day, has the broadest meaning. It does not mean merely that the ship must be fit to withstand the force of the wind and the waves, but that she must be fit to carry the cargo which is received, and she must be fit in *every* compartment, and for each *kind* of cargo. Thus a ship is unseaworthy if, when carrying horses, she has become infected because a prior shipment of horses suffered from foot and mouth disease (*Tattersall* v. *National S.S. Co.*, 12 Q. B. 297); if she loads lemons, knowing that she must be fumigated at a later port where the lemons will be injured (*Ciampa* v. *British India Co.*, L. R. [1915] 2 K. B. 774); if the machinery serving her refrigerating compartment is out of order (*The Southwark*, 191 U. S. 1; *Cargo per Maori King* v. *Hughes*, L. R. [1895] 2 Q. B. 550); if her strong-room is not strong enough to keep out thieves (*Queensland National Bank* v. *P. & O. S. N. Co.*, L. R. [1898] 1 Q. B. 567). So a vessel loading asphalt may be unseaworthy if fitted with permanent battens which are not lined so as to make her fit for asphalt (*Dene Steamship Co.* v. *Tweedie Co.*, 143 Fed. 854, C. C. A.)

The general principle is summed up in *Carver on Carriage by Sea*, 7th Ed., Sec. 19a, as follows (pp. 29-30):

"This warranty is not limited to the mere fitness to encounter sea perils. If the ship is to carry goods of a particular kind, the implied warranty requires that the ship and her equipment be fit for the purpose of safely carrying those goods to their destination.

Thus, where the contract is for the carriage of frozen meat in a ship fitted with refrigerating machinery, there is an implied warranty that the ship and refrigerating machinery are fit to receive and carry the frozen meat safely on the agreed voyage.

* * * * * * *

And where specie is to be carried in one of the class of ships which are provided with strong rooms for that purpose, so that the contract is presumably made in relation to carriage in such a room, there is an implied warranty that the strong room is reasonably fit to resist thieves.

In certain cases of this nature it is necessary to distinguish between unseaworthiness and bad stowage not amounting to unseaworthiness. Thus in Upperton v. Union Castle Mail Steamship Co., 8 Com. Ca. 96; 9 Com. Ca. 50, passengers' luggage received at an intermediate port was stowed in a lavatory and became damaged owing to a negligent user of an adjoining lavatory; it was held to be a case of unseaworthiness, since the lavatory was an improper receptacle, but was the only receptacle available when the luggage was shipped."

In *The Indrapura*, 178 Fed. 591, the Court said (p. 594):

"There can be little question that a vessel seaworthy as to navigation may be unseaworthy as to cargo. So a ship may be seaworthy as to one part of the cargo and unseaworthy as to another. * * * The term 'seaworthy' in its earlier use, it must be admitted, was not of as broad or extended signification as under the present advanced state of commerce and transportation facilities; but it now has relation to the article carried, and the different compartments of the ship and their particular use as well as to the navigability of the ship. The Southwark, supra; The Thames, 61 Fed. 1014, 10 C. C. A. 232; The British King, (D. C.) 89 Fed. 872."

A ship may also be unseaworthy as to her crew or as to her passengers or her passengers' baggage, as shown above.

These various illustrations of the meaning of the word "seaworthy" are given in order to test the majority opinion of the Court. Is it possible that Congress, when enacting a statute to bring our law into line with that of other countries, really intended that, if a few boxes of tea were stowed in a compartment in which apples had been carried, or if the cattle fittings for fifty mules were not sufficiently strong, or if the pipe from a lavatory leaked into a baggage room containing a few trunks, then the carrier should be responsible, not merely for the damage done to the tea and to the cattle and to the trunks, but for the loss of the entire cargo of the ship, in the event that she was sunk by a collision, whether or not due to negligent navigation, or by a submarine, or was struck by lightning?

It is submitted that it cannot be assumed that Congress ever intended to produce such results, and that the decision

of this Court is not supported by the authorities referred to in the opinion. It is there stated that "the maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, *though the unseaworthy feature is unrelated to the loss.*" Every authority which is relied upon to support this statement is taken from the realm of marine insurance and from that feature of it which has to do with misrepresentation or concealment in the securing of the policy or with the violation of an express or an implied warranty contained in the policy.

The difference between a contract of marine insurance and a contract for the carriage of goods is fundamental. A marine underwriter agrees to insure subject to certain conditions, express or implied; when these conditions are not complied with, the contract is at an end. That is not the effect of a breach of a warranty of seaworthiness as regards a contract for the carriage of goods; on the contrary, the contract of carriage still remains in effect (*Kish* v. *Taylor,* L. R. [1912] A. C. 604). Although the ship may be unseaworthy, the shipowner is still entitled to the freight (see *Parsons on Shipping,* pp. 285, 320).

As was said in *The Malcolm Baxter, Jr.,* 277 U. S. 323, at pp. 331, 333:

"Unseaworthiness * * * displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. * * * The clauses of the bill of lading remain effective."

A shipowner does not become liable for damage to cargo merely because his ship is unseaworthy; the unseaworthiness must proximately cause the loss (*The Europa,* L. R. [1908] Probate 84; *The Malcolm Baxter, Jr., supra; The Francis Wright,* 105 U. S. 381, 387). As said in *The Malcolm Baxter, Jr.,* referring to an earlier decision, at p. 334:

"* * * the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now."

A bill of lading clause requiring that notice of claim be given within thirty days from the date of the bill of lading is applicable and protects the shipowner, even though the vessel was plainly unseaworthy on sailing (*The Queen of the Pacific,* 180 U. S. 49).

It is respectfully submitted, therefore, that the Harter Act is not properly to be construed like a policy of marine insurance but rather as a contract of carriage and that unseaworthiness not causing a loss is to be disregarded.

And even in the field of marine insurance, breach of a warranty does not always discharge the insurer irrespective of causal connection. Thus in *Smith* v. *Northwestern F. & M. Ins. Co.,* 246 N. Y. 349, 361 (cited by this Court), the Court, in speaking of the continuing duty to keep a vessel seaworthy, said:

"Indeed, the breach of the implied warranty does not even suspend the risk in the absence of a causal relation between breach and loss."

As to the last sentence in the extract of the opinion above quoted, which refers to the "complications and embarrassments" which would ensue if the Court were to endeavor to determine "the tendency of an unseaworthy defect to aggravate the risk of careless navigation," we submit that the Courts would be required to do no more than to apply the well-known rule of proximate cause, which is a well nigh universal principle in the law. A vessel, for instance, sails without one of her mates; immediately after sailing a collision occurs and litigation takes place between the vessels, no question as to cargo being involved. The question before the Court is whether the absence of the mate contributed to the collision. So, when a lookout is not stationed (*The Bluejacket,* 144 U. S. 371).

In the latter part of its opinion, the Court states that, where unseaworthiness "is the basis of a suit for damages * * *, there can be no recovery of damages in the absence of a causal relation between the loss and the defect" (p. 13). In that class of case, and in other maritime litigation, the usual rule of proximate cause is adhered to and it causes no embarrassment.

A statute might, of course, be passed which would make the shipowner an insurer of the cargo if the ship was unseaworthy in the slightest degree and even though the unseaworthiness did not render her unfit as a ship but related solely to an insignificant part of the cargo or the baggage. We submit, however, that such an extraordinary intent is not to be presumed. Every statute must be construed in accordance with the rule of reason (*Standard Oil Co.* v. *United States,* 221 U. S. 1).

It is respectfully asked that a rehearing be granted on the foregoing grounds.

CHARLES S. HAIGHT,
JOHN W. GRIFFIN,
Counsel for Respondent.

We, CHARLES S. HAIGHT and JOHN W. GRIFFIN, counsel for the respondent above named, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CHARLES S. HAIGHT,
JOHN W. GRIFFIN,
Counsel for Respondent.

APPENDIX.

The Text of the Harter Act.

ACT OF FEBRUARY 13, 1893:

SEC. 1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or

owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping documents, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. For a violation of any of the provisions of this Act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. This Act shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners or representatives.

SEC. 7. Sections 1 and 4 of this Act shall not apply to the transportation of live animals.

10

SUPREME COURT OF THE UNITED STATES.

No. 80.—October Term, 1933.

Louis H. May, Indemnity Insurance Company of North America, and Royal Indemnity Company, Petitioners, *vs.* Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 4, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The assignee of cargo owners filed libels against the respondent, the owner of the "Isis," to recover moneys deposited as security for general average contributions, the deposit being exacted by the respondent as a condition of delivery.

The Isis, a vessel of about 7,000 tons, sailed from loading ports on the Pacific coast with cargo destined for Bremen, Hamburg and Antwerp. She was then seaworthy in hull and gear, and fitted in all respects for the intended voyage. In the Weser River, not far from Bremen, Germany, her first port of discharge, she stranded by reason of negligent navigation with damage to her rudder stock and also to the rudder blade. Aided by tugs she continued up the river to Bremen, disclosing as she moved a tendency to sheer to starboard. On arrival at that port, she discharged her Bremen cargo, and there was then an inspection of the damage. The rudder stock had been twisted about 45 degrees. To ascertain the condition of the blade, the vessel was put in a drydock and kept there a few hours. The examiners reported that the blade was intact. In fact the lower part of it was bent to starboard to the extent of about five degrees. The inspection was after dark with the bottom of the rudder still under water. The two courts below have concurred in a finding that the use of reasonable care would have caused the bend to be discovered.

The head office of the owner at Hamburg was notified of the mishap to the vessel before she landed at Bremen, and the marine superintendent was sent to meet her. The superintendent, Reichenbacher, and the master of the vessel, Krueger, consulted, along with others, as to what ought to be done. Bremen had adequate facilities for the making of complete repairs, but it would have taken about two weeks to make them. To save time and expense to the vessel and her cargo, the decision was made to send her to Hamburg about seventy miles away, the cargo still aboard. Before a start was made, the rudder was lashed amidships so as to be incapable of motion. The vessel then set forth in the towage of three tugs, one of them in front, and one on either side. No harm befell for a distance of about six miles. Then, at or near the junction of the Weser and Lesum Rivers, the pilot in control changed her course to starboard in order to pass a vessel coming up. There is a finding that her navigation at this point was unskilful and negligent in that she was driven at too high a speed and too close to the edge of the channel. At all events, in passing she made a sheer to starboard which the tugs and her engines were unable to control. She was stranded hard and fast amidships on a sand spit near the bank.

With the aid of tugs and lighters the vessel and the cargo were brought back to Bremen where the new damage was repaired. It was in the course of these repairs that the bend in the rudder was observed.* In the meantime the entire cargo was transshipped to Antwerp. Before delivery at destination, the respondent made demand of the consignees that they deposit sums of cash as security for the payment of general average contributions to the sacrifices and expenses due to the two strandings. The bills of lading contain what is known as the Jason clause (*The Jason*, 225 U. S. 32, 49) whereby the consignees agree that if the ship owner has used

*We have assumed for present purposes that the bend was the result of the first stranding, and not the second. This is in accordance, it seems, with the opinion of the Court of Appeals. The Commissioner who heard the witnesses, found that the evidence was too evenly balanced to enable him to make a finding either way. Since the burden of proof was on the respondent to make out its claim for exemption, the effect is the same as if the finding were against it. The Commissioner did find that the bend, if it existed, could have been discovered by the exercise of reasonable care.

due diligence to make the ship seaworthy, the cargo is to be liable in general average when the sacrifice or expense results from negligent navigation. The form of the clause applicable to nearly all the shipments is stated in the margin.* For a small part of the shipments the form is slightly different, but no point is made that there is any difference of meaning. Under these clauses the consignees do not dispute the liability of the cargo for general average contributions in respect of the first stranding. They do dispute the liability in respect of the second. To recover their deposits to the amount of that excess, they transferred their claims to an assignee by whom five libels, afterwards consolidated, were filed against the owner. The District Court, confirming the report of a commissioner, gave judgment for the defendant, 57 F (2d) 265. The Court of Appeals for the Second Circuit affirmed (63 F. (2d) 248), though in so doing it did not agree with all the findings below. The libellant, May, joined the stipulators for costs (Indemnity Insurance Company of North America and Royal Indemnity Company) in a petition to review the decree of affirmance. A writ of certiorari brings the case here.

1. The first question to be determined is whether the cargo must contribute to the sacrifices and expenses resulting from the second stranding if there was a negligent failure by the shipowner to make the ship seaworthy when she left her dock at Bremen.

*General Average shall be payable in accordance with York-Antwerp Rules 1890 and at carrier's option as to matters not therein provided for in accordance with the laws and customs of the port of New York. All General Average statements shall be prepared at the vessel's final port of discharge or elsewhere at the carrier's option. If the carrier shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or error in navigation or in the management of the vessel, or from any latent or other defect in the vessel, or machinery, or appurtenances, or from unseaworthiness, although existing at the time of shipment or at the beginning of the voyage (provided the defect or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees, or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect to the cargo, and shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

Until the enactment of the Harter Act (Feb. 13, 1893, c. 105, § 3, 27 Stat. 445; 46 U. S. C., § 192) a shipowner was not at liberty by any contract with the shipper to rid himself of liability to the owners of the cargo for damages resulting from the negligence of the master or the crew. *Liverpool & G. W. Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438; *The Delaware*, 161 U. S. 459, 471; *The Jason, supra*, p. 49; *The Willdomino*, 300 Fed. 5, 9. Section 3 of the Harter Act* was the grant of a new immunity. Neither the vessel nor her owner was to be liable thereafter for damage or loss resulting from faults or errors in navigation or in management, if the owner had complied with a prescribed condition. The condition was that he must have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied. If that condition was not fulfilled, there was liability for negligence in accordance with the ancient rule. Release from liability for negligence when effected by the act did not mean, however, that an obligation was laid upon the cargo to contribute to general average. *The Irrawaddy*, 171 U. S. 187. To create that obligation there was need of an agreement. For a time there was doubt whether such an agreement, if made, would be consistent with public policy. The doubt was dispelled by the decision in *The Jason, supra*. "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-

*Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of *The Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated." *Ibid,* p. 55.

The Isis being seaworthy when she broke ground in the Pacific, the cargo was under a duty to contribute to the expenses of the first stranding, which occurred as the result of faulty navigation before the arrival of the ship at Bremen. Neither here nor in the courts below has there been any contention to the contrary. Whether a like duty existed in respect of the expenses of the second stranding is not so easily determined. The only negligence for which immunity is given by § 3 of the Harter Act is negligence in the navigation or management of the ship. *The Carib Prince,* 170 U. S. 655, 661, 662; *International Navigation Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218. If the master of the Isis had acted on his own responsibility at Bremen in sending the vessel on, the fault would have been negligence in management, or so we may assume. But that is not what happened. The owner intervened by its marine superintendent, who was sent from Hamburg to Bremen to inspect the disabled vessel and determine what to do. He consulted with the master and others. The decision in the end was his. This he tells us very frankly. If reasonable diligence would have shown that the vessel was unseaworthy when he sent her on her way, there was something more than an error in navigation or management on the part of master or of crew. There was a failure by an owner to fulfill the condition on which immunity depended.

We do not forget that seaworthiness is determined for many purposes according to the state of things existing at the beginning of the voyage. This is true of a warranty of seaworthiness in charter parties or in contracts of affreightment. *The Edwin I. Morrison,* 153 U. S. 199, 210; *The Caledonia,* 43 Fed. 681, 685; 157 U. S. 124, 130; *Earle and Stoddart* v. *Wilson Line,* 287 U. S. 420, 426; *McFadden* v. *Blue Star Line,* [1905] 1 K. B. 697, 703. It is true of the like warranty in contracts of marine insurance. *Union Ins. Co.* v. *Smith,* 124 U. S. 405, 427; *Smith* v. *Northwestern Fire & Marine Ins. Co.,* 246 N. Y. 349, 359, 363, 364. But the pro-

visions of the Harter Act relieving an owner from liability to the cargo for errors of management or navigation do not charge him with a warranty. What they say to him is this, that if he wishes the immunity he may have it, but only upon terms. He must do what in him lies by the exertion of due diligence to make the vessel safe and sound. If the management of the ship is in the hands of master and crew, he will be relieved of liability for supervening losses, provided only that his own duty has been fulfilled at the beginning. If the term of management is over and the ship is in his hands again, the duty is renewed.

The question then is when management begins and ends. Iron shutters are left open through the negligence of the crew while the ship is in a heavy sea. Liability for the damage will not be chargeable to the owner, for this is a fault of management. *The Silvia*, 171 U. S. 462. Upon arrival at a port of call, the master is negligent in his inspection of the ship or its equipment. Liability for the damage will not be chargeable to the owner, for this again is a fault of management. *The Steel Navigator*, 23 F. (2d) 590; *The Milwaukee Bridge*, 26 F. (2d) 327, 330; *United States* v. *N. Y. & O. S. S. Co.*, 216 Fed. 61, 71; *Jai Wai Nam* v. *Anglo Am. Oil Co.*, 202 Fed. 822; *The Guadeloupe*, 92 Fed. 670. Cf. Carver on Carriage by Sea, 7th ed., § 103e, collating the decisions. Arrived at destination, the engineer omits to close a valve with resulting damage to the cargo. Once more, liability for the damage will not be chargeable to the owner, for this again is management. *The Wildcroft*, 201 U. S. 378. One has only to sketch these situations in order to perceive the gap dividing them from that before us here. Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. Response to that appeal destroys the continuity of the voyage, as if it were broken into stages. Cf. Arnould, Marine Insurance, 11th ed., vol 2, §§ 699, 700, 701; *Greenock S. S. Co.* v. *Maritime Ins.*, [1903] 2 K. B. 657. An owner intervening in such circumstances must be diligent in inspection or forfeit his immunity. Negligence at such a time is not the fault of servants employed to take the owner's place for the period of a voyage. It is the fault of the owner personally, exercising his own judgment to determine whether the voyage shall go on. *The Waalhaven*, 36 F. (2d) 706, 709.

2. Due diligence being necessary to make the ship seaworthy at Bremen as well as at the Pacific ports, the second question to be determined is whether due diligence was used.

The District Court and the Commissioner found that the Isis, though crippled when she left the dock at Bremen, was seaworthy with the aid of tugs for the voyage then before her. Seaworthiness, it is well known, is a relative term. *The Sagamore,* 300 Fed. 701, 704; Carver, Carriage by Sea, 7th ed., § 18 and cases cited; Arnould, Marine Insurance, 11th ed., § 710. The Court of Appeals held the view, according to our reading of the opinion, that the vessel with her rudder disabled and defective was not so fitted for her voyage as to cast upon the cargo the risk of faults of navigation.

The respondent, claiming the benefit of a conditional exemption, has the burden of proof that the condition was fulfilled. *The Southwark,* 191 U. S. 1, 12; *The Wildcroft, supra* at p. 386. We are unwilling to say in opposition to the finding of the Court of Appeals that the burden has been borne. The fact is undisputed that the rudder, being disabled, was useless as an instrument to control the movement of the vessel. There is evidence that in addition to being useless it was positively harmful by reason of a bend to starboard. These two defects together defeat the carrier's endeavor to shift the risk upon the cargo.

The respondent insists that a vessel may be seaworthy though she is navigated by tugs. No doubt that is true where the rudder is capable of use. This is far from saying that the risk to the cargo is not appreciably increased if the rudder is out of commission and so incapable of giving aid when an emergency arises. There is no need to go beyond the pages of this record for proof that this is so. Witnesses for the respondent tell us that a vessel with her rudder lashed may be towed without risk if the speed of the tugs is slow, less than seven kilometers an hour. They admit that the useless rudder becomes a source of danger if the speed of the tugs is higher, seven kilometers or more. We turn to the findings of the Commisisoner approved by the District Court. From these it appears that the Isis was proceeding, when she sighted the upbound steamer, at a speed of more than eight kilometers an hour. Not only that, but the Commissioner has found that she

was navigated at too high a speed and too close to the edge of the channel, and that because of these errors she stranded a second time. The speed and the place would in all likelihood have been harmless if she had been navigating the river with her steering gear in order. The carrier sent her forward with her steering gear crippled when there was opportunity to make it sound. No doubt there are occasions when owner and master are left without a choice. The vessel may be disabled at a place where the making of repairs is impossible or unreasonably difficult. In such circumstances she must go her way with such help as can be gathered. Here no emergency was present to excuse the decision that was made. The carrier would have had no difficulty in making the repairs at Bremen. The risks of navigation that are cast by statute upon the owners of the cargo are those that remain after the carrier has done his duty. They do not include risks that would have been avoided or diminished if the vessel had gone out with her equipment staunch and sound. A carrier who chooses for his own purposes to send out a crippled ship with needless enlargement of the perils of navigation will not receive exemption at the cost of the owners of the cargo if the perils thus enlarged have brought the ship upon the sands. "When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas." Learned Hand, J., in *The Elkton*, 49 F. (2d) 700, 701.

The rudder, however, was not merely useless and disabled. By reason of the bend of five degrees, it was positively harmful at least to some extent. Reichenbacher, the marine superintendent, stated in his testimony that he would never have let the vessel leave the dock at Bremen if he had known of the bend. Krueger, the master, testified to the same effect. The Commissioner put aside these admissions with the remark that the witnesses "overdid an effort to establish a character for caution." He preferred to accept the testimony of Captain Davis, a tried and efficient wreck-

master in the Harbor of New York, who testified as an expert without personal experience of the navigation of the Weser. Captain Davis stated that a bend of fifteen degrees would surely have been dangerous, that there would probably have been danger in a bend of ten degrees, but that a bend of five degrees would not prevent the ship from being under command, particularly if the ship was going at a low speed. At the same time he admitted that even a five degree bend would affect the ship to some extent, and that it would be very important and valuable to know of its existence. Such testimony is far from convincing in the face of the admissions of the superintendent and the master who had every motive to present the case in the way most helpful to the owner. The argument is pressed that if the bend of five degrees had a tendency to sheer the ship to starboard, the movement should have been felt during the six miles traveled before the second stranding. We follow the courts below in their finding that the sheering was not observed, though there is evidence to the contrary. Even so, the movement may have been so counteracted by the engines of the vessel and the tugs that little heed was given it. In any event the significant fact remains that there is no finding by any court that the bend in the rudder did not affect the steering of the Isis at the moment of the stranding. The Commissioner found that the vessel did not have any "marked tendency to sheer," and that if such a tendency existed, the power of her engines and the tugs was adequate to correct it. The Circuit Court of Appeals held that the bend would not affect the steering "except to a slight extent."

We think the cumulative effect of the evidence that the rudder was disabled and that there was a bend of five degrees is to exact of us a holding that the respondent has failed to sustain the burden of establishing due diligence in making the ship seaworthy for her voyage down the Weser.

3. If due diligence was not used in creating a seaworthy condition, the third question to be determined is the need of a causal relation between the defect and the ensuing loss.

The District Court and the Court of Appeals, though at odds with each other as to the seaworthy condition of the vessel when it left the dock at Bremen, are at one in finding that the cause of the stranding was faulty navigation. Cf. *Orient Ins. Co.* v. *Adams,*

123 U. S. 67, 72; *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 492; *The Manitoba*, 104 Fed. 145, 154, 155.

Whether a shipowner who negligently omits to make his vessel seaworthy may have the benefit, none the less, of section 3 of the Harter Act if there is no causal relation between the defect and the disaster is a question as to which the circuit courts of appeal in different circuits, and even at times in the same circuit, are divided into opposing camps, though the discord in many instances is the outcome of dicta rather than decisions.

Favoring the view that the benefit of the act is lost without reference to any causal relation between the defect and the disaster are *The Elkton, supra*, p. 701 (Second Circuit); *Louis Dreyfus & Co.* v. *Paterson Steamships, Ltd.*, 1933, — F. (2d) — (Second Circuit) not yet reported; *The Willdomino*, 300 Fed. 5, 10, 11 (Third Circuit), affirmed on other grounds in 272 U. S. 718; *The R. P. Fitzgerald*, 212 Fed. 678 (Sixth Circuit); also the following decisions of District Courts: *The River Meander*, 209 Fed. 931, 937; *Merklen* v. *Johnson & Higgins*, 3 Fed. Supp. 897; *The Indien*, 1933 American Maritime Cases, 1342. Favoring the other view are *The Spartan* (*Hartford and N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*), 47 F. (2d) 189, 192 (Second Circuit); *Rosenberg* v. *Atlantic Transport Co.*, 35 F. (2d) 739 (D. C Cal.); and cf. *The Turret Crown*, 284 Fed. 439, 444, 445 (Fourth Circuit); *The Thessaloniki*, 267 Fed. 67, 70 (Second Circuit).

We think the rulings and dicta of the cases in the first group are supported by the better reasons.

The statute, aided by the contract, gives the shipowner a privilege upon his compliance with a condition. If he would have the benefit of the privilege, he must take it with the attendant burden. There would be no end to complications and embarrassments if the courts were to embark upon an inquiry as to the tendency of an unseaworthy defect to aggravate the risk of careless navigation. Little can be added on this point to what has been said so well by Learned Hand, J., in a case already cited. *The Elkton, supra.* The barrier of the statute would be sufficient, if it stood alone, to overcome the claim of privilege. It is reinforced, however, by the barrier of contract. The Harter Act, as we have seen, would not impose upon the cargo a duty to share in general average contribu-

tion if the Jason clause or an equivalent were not embodied in the bill of lading or contract of affreightment. The owners of this cargo have stated the conditions on which they are willing to come in and pay their share of the expenses. A court should be very sure that the literal meaning is not the true one before subtracting from conditions that are clear upon their face.

We are told that the provisions of the Harter Act will lead to absurdity and hardship if an unseaworthy condition is to take away from the carrier an exemption from liability for the negligence of its servants in the management of the vessel without a causal relation between the defect and the disaster. Extreme illustrations are set before us, as where there is a loose rivet in the deck, or a crack in a hatch cover, or one less messboy than required. Seaworthiness of the vessel becomes, it is said, a whimsical condition if exemption is lost through defects so unsubstantial. We assume for present purposes that the nature of the defects brought forward as illustrations is sufficient to condemn a vessel as unfitted for her voyage. Even if that be so, the argument for the respondent loses sight of the value of a uniform rule that will put an end to controversy where the causal relation is uncertain or disputed. Particularly is there need of such a test where the carrier asks to be relieved from liability for conduct which without the benefit of the statute would be an actionable wrong. The maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, though the unseaworthy feature is unrelated to the loss. The law reads into a voyage policy of insurance a warranty that the vessel shall be seaworthy for the purpose of the voyage. There are many cases to the effect that irrespective of any relation of cause and effect, the breach of the warranty will vitiate the policy. What is implied is a condition, and not merely a covenant, just as here there is not a covenant, but a condition of exemption. See *Smith* v. *Northwestern Fire & Marine Insurance Co., supra,* at p. 363, summarizing the following decisions. Thus, in *DeHahn* v. *Hartley* (1786, 1 T. R. 343; afd., 1787, 2 T. R. 186, n) a vessel was insured on a slaving voyage, "at and from Africa to her port or ports of discharge in the British West Indies," and a memorandum was inserted in the margin of the policy that the vessel had "sailed from

Liverpool with fourteen six-pounders, swivels, small arms and fifty hands or upwards coppersheathed." It appeared that the ship had actually sailed from Liverpool with only forty-six men instead of fifty, but that within twelve hours of leaving Liverpool she had taken on board at Beaumaris six additional hands; and evidence was also given that the ship between Liverpool and Beaumaris was quite as safe with forty-six men as she would have been with fifty. The court unanimously held that the policy was void *in toto*. Arnould, Marine Ins., § 633. Again in *Forshaw* v. *Chabert* (1821, 3 Brod. & B. 158) a policy was effected on a voyage "at and from Cuba to Liverpool." The captain having lost some of his outward crew by sickness and desertion at Cuba, and finding it impossible there to engage ten men, his proper complement for Liverpool, sailed from Cuba with only eight men engaged for Liverpool, and two for Montego Bay (Jamaica), where he touched and landed the two men, and whence having procured others to supply their place, he proceeded on his voyage to Liverpool. The court held (*inter alia*) that the ship was not seaworthy when she sailed from Cuba for a voyage to Liverpool, as she ought then to have had on board a full complement of men engaged for the whole voyage. Arnould, Marine Ins., § 723. Again in *Queen Marine Ins. Co.* v. *Commercial Bank of Canada* (1870, L. R. 3 P. C. 234) a vessel, covered by a voyage policy, left port with a defective boiler. She stopped at an intermediate port where the boiler was repaired. A loss occurred thereafter. The Judicial Committee of the Privy Council held, after a full review of the authorities, that the underwriters were discharged by force of the breach of warranty at the inception of the voyage.*

The distinction is apparent between suits such as this where the unseaworthiness of a vessel is merely a condition of exemption and suits where the unseaworthiness of a vessel is the basis of a

*Compare the decisions discharging insurers where there has been a wrongful deviation, irrespective of resulting damage: Fernandez *v.* Great Western Ins. Co., 48 N. Y. 57; Snyder *v.* Atlantic M. Ins. Co., 95 N. Y. 196; Burgess *v.* Eq. Ins. Co., 126 Mass. 70; and relieving cargo owners in like circumstances from exemptions in bills of lading that would otherwise be binding: Joseph Thorley, Ltd. *v.* Orchis S. S. Co., Ltd., [1907] 1 K. B. 660; Foscolo Mango & Co., Ltd. *v.* Stag Line, Ltd., [1931] 2 K. B. 48; affd. *sub nom* Stag Line, Ltd. *v.* Foscolo, Mango & Co., Ltd., [1932] A. C. 328. The Malcolm Baxter, Jr., 277 U. S. 323, 332.

suit for damages. In cases of the latter order there can be no recovery of damages in the absence of a causal relation between the loss and the defect. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 333; *The Francis Wright*, 105 U. S. 381, 387. "If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages." *The Francis Wright, supra.* Unseaworthiness viewed as a condition of exemption stands upon a different footing from unseaworthiness viewed as the subject of a covenant.

We are thus brought to the conclusion that the shipowner was not relieved by the Harter Act from the negligence of the pilot in the navigation of the vessel, and that for like reasons the cargo owners are not chargeable with general average contributions.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

It is so ordered.

Mr. Justice McReynolds and Mr. Justice Butler think that the court below was right and that its decree should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.